DOCUMENT RESUME

ED 426 464 EA 029 541

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TITLE The Trouble with Academic Discipline.
INSTITUTION National School Boards Association, Alexandria, VA. Council of School Attorneys.
PUB DATE 1998-07-00
NOTE 18p.
AVAILABLE FROM NSBA Council of School Attorneys, 1680 Duke Street, Alexandria, VA 22314 (by subscription: $80 for 6 issues).
PUB TYPE Collected Works - Serials (022)
JOURNAL CIT Inquiry & Analysis; Jul 1998
EDRS PRICE EDRS Price MF01 Plus Postage. PC Not Available from EDRS.
DESCRIPTORS Academic Achievement; Constitutional Law; *Court Litigation; Discipline; *Discipline Policy; Elementary Secondary Education; Student Improvement

ABSTRACT

Educators and attorneys routinely struggle with the issue of mixing academic evaluation with student discipline, as this summary of litigation reveals. The text opens with a synopsis of academic sanctions for nonattendance and unexcused absences, advising school districts that any grade-reduction policy should have an educational purpose. The focus is on "Campbell v. Board of Education of New Milford," in which the court upheld a school district's authority to impose academic sanctions for nonattendance and unexcused absences. The court rejected the plaintiffs' argument that the attendance policy violated substantive due process requirements in that it infringed on the students' fundamental rights to public education. But school districts should note that the school's policy was for educational purposes, not for disciplinary ends. School districts using attendance polices that classify absences due to disciplinary suspension as unexcused and subjecting the student to loss of credit may not rely on the decision in "Campbell" as justification for the policy. Other courts have ruled that a school must be able to demonstrate a reasonable relationship between the student's misconduct and academic performance. Subsequently, school districts should be wary of imposing academic penalties for misbehavior unrelated to educational performance or evaluation. (RJM)

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JULY 1998

Inquiry & Analysis

The Bimonthly Publication of the NSBA Council of School Attorneys

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The Trouble with Academic Discipline

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Educators and attorneys routinely struggle with the issue of mixing academic evaluation with student discipline. School districts commonly adopt policies that provide for a reduction in grades for nonattendance as well as for disciplinary reasons. The few cases that address this issue do not reveal any consensus among the courts. While school officials have broad authority in the evaluation of students, several courts have held that the exercise of that authority cannot be so broad and indiscriminate as to permit an unreasonable exercise of discretion. Most courts would agree that a school district has the authority to enforce an attendance policy that reduces grades for nonattendance when the policy specifically states that its purpose is educational.[2] Conversely, a policy that calls for grade reduction to discipline nonacademic conduct may be challenged on the grounds of unreasonable use of discretion and, based on a review of the existing case law, most likely would be declared null and void by a reviewing court.[3] At a minimum, school districts applying academic sanctions for disciplinary infractions should be prepared to argue that the policy does not constitute an *ultra vires* act and does not violate the students' substantive and procedural due process rights.

ACADEMIC SANCTIONS FOR NONATTENDANCE AND UNEXCUSED ABSENCES

Proponents of grade reduction policies often cite *Campbell v. Board of Education*[4] as an example of a court upholding a school district's authority to impose academic sanctions for nonattendance and unexcused absences. The *Campbell* case was a class action lawsuit brought by John Campbell on behalf of himself and other students penalized academically for nonattendance under the New Milford attendance policy. The policy provided two sets of academic sanctions for students absent from school. The first penalty called for course credit to be withheld from any student who, without receiving an administrative waiver, was absent from any year long course for more than twenty-four class periods. All absences were counted in the calculation of twenty-four absences with the exception of absences for school-sponsored activities or "essential administrative business." The second penalty provided for a five-point reduction in grade for each unapproved absence after the first. The five-point reduction penalty was also subject to administrative waiver and allowed for extensive counseling opportunities after the first unexcused absence. Campbell challenged the policy of the New Milford School District, claiming that it constituted an *ultra vires* act and violated his substantive and procedural due process rights.

The Connecticut Supreme Court upheld the New Milford School District's authority to enact a policy that penalized students academically for violations of the school district's attendance policy. The court found that the authority to adopt uniform rules concerning irregularity of attendance arose implicitly from statutory provisions authorizing local implementation of the educational mission of the state.[5] The Connecticut statutory framework was such that the nexus between classroom presence and grading was a logical presumption for the court. Therefore, the court held that the policy did not constitute an *ultra vires* act. The court specifically distinguished several cases cited by Campbell as supporting his view that school wide academic sanctions for nonattendance is tantamount to an *ultra vires* act.

The court also rejected Campbell's argument that the attendance policy violated substantive due process requirements in that it infringed on the students' fundamental rights to public education, on students' liberty interests in their academic reputation and on the students' property interests in grades reflecting academic achievement. The policy itself was factually important to this decision. It called for disclosure on the report card of the reduction in grade; specifically noted its educational, as opposed to disciplinary, purpose; and provided for a waiver and counseling if applicable. The wording and application of the policy led the court to conclude that the policy served academic, not disciplinary, objectives.[6] Therefore, it applied the rational basis test to determine that the policy was neither arbitrary nor capricious.

Finally, the court addressed Campbell's claim of deprivation of procedural due process. Campbell argued that the United States Supreme Court protected his right to procedural due process in *Goss v. Lopez*[7] and that the New Milford School District denied him that right by failing to give him proper notice of the policy and its penalties. The court first noted that the Supreme Court had recently clarified the standard promulgated in *Goss*. In *Board of Curators of the University of Missouri v. Horowitz*, the Court held that in terms of providing procedural due process, there are "far less stringent procedural requirements in the case of an academic

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1. The author wishes to thank Lance L. Melton, General Counsel, Montana School Boards Association, and Catherine M. Swift, Esq., for their assistance in preparing this article.
2. *See Knight v. Board of Education*, 348 N.E.2d 299 (Ill. App. 1976).
3. *See Katzman v. Cumberland Valley School District*, 479 A.2d 671 (Pa. Commw. 1984).
4. *Campbell v. Board of Education of New Milford*, 475 A.2d 289 (Conn. 1984).
5. *Campbell*, 475 A.2d at 290.
6. *Campbell*, 475 A.2d at 293.
7. *Gutierrez v. School District R-1*, 585 P.2d 907 (Colo. App. 1978); *Dorsey v. Bale*, 521 S.W.2d 76 (Ky. 1975); *State ex rel. Miller v. McLeod*, 605 S.W.2d 160 (Mo. App. 1980); *State ex rel. Sagaser v. Ledbetter*, 550 S.W.2d 230 (Mo. App. 1977); *Matter of Blackman v. Brown*, 419 N.Y.S.2d 796 (Sup. Ct. 1978).
8. *Campbell*, 475 A.2d at 296.
9. 419 U.S. 565 (1975) (a state-created property interest in education implicates the right to procedural due process and thus requires notice and an opportunity to be heard).

INQUIRY & ANALYSIS is a bi-monthly publication of the NSBA Council of School Attorneys, 1680 Duke Street, Alexandria, Virginia 22314, (703) 838-6722. Naomi E. Gittins, Staff Attorney and Editor; Ann L. Majestic, Council Chairman; Barbara M. Wheeler, NSBA President; Anne L. Bryant, NSBA Executive Director; Julie Underwood, General Counsel; Susan R. Butler, Director; Lyndsay Andrews, Legal Services Manager and Thomas W. Burns, Legal Assistant. *I&A* is a membership service of the Council or can be purchased by subscription for $80/6 issues. Copyright © 1998 by the National School Boards Association. All Rights Reserved.

dismissal" than for a dismissal based on disciplinary reasons.[10] Since the court had already deemed the policy to be academic rather than disciplinary in nature, it relied on the Supreme Court's analysis in *Horowitz* to determine that Campbell had been afforded sufficient due process to pass constitutional muster.

The court in *Campbell* concluded that the policy was carefully drafted, fairly applied and legally valid. Under the facts of that particular case, the court clearly reached the correct conclusion. However, many districts using the analysis in that opinion as support for grade reduction policies have failed to consider the specific facts that led the court to determine that Campbell's substantive and procedural due process rights had not been violated by the application of the policy. Because the students' report cards clearly reflected which grades had been reduced as a result of the attendance policy and listed the number of unexcused absences, it was possible to determine the actual academic achievement of the student by looking at the number of unexcused absences and the final, altered grade. This practice alleviated the concern of an intentional misrepresentation of academic achievement and the potential harm to students that the misrepresentation might produce.

The policy also explicitly stated that its purpose was educational as opposed to disciplinary. The court put great weight on this distinction in terms of due process. It analyzed the right to substantive due process under the rational basis test rather than strict scrutiny because the policy was neither disciplinary nor an infringement of equal educational opportunity. The court used the United States Supreme Court's holding in *Horowitz* to analyze the procedural due process claim because it had previously determined that the policy was academic rather than disciplinary. The standard in *Horowitz* allowed the court to reject Campbell's argument that he was entitled to a hearing on the matter and to defer to the "policy judgments of the academic administrators who formulated the defendant school board's attendance program."[11] This deferral of judgment was possible only because of the explicit statement and application of the policy for educational rather than disciplinary purposes. The court determined that the policy was educational rather than disciplinary because a student's disciplinary suspension from school, for reasons unrelated to attendance, was considered an *approved* rather than an unapproved absence. With an approved absence, the student had the opportunity to make up the work missed. In addition, a student's absence from school, whether approved or unapproved, was not grounds for suspension or expulsion.

These factors are key. School districts using attendance policies that classify absences due to disciplinary suspension as unexcused and subjecting the student to loss of credit for work missed and/or a percentage deduction in overall grade, may not rely on the decision in *Campbell* as justification for the policy. Such a policy most likely would be considered disciplinary in nature and possibly an infringement of a fundamental right under state constitutions. In addition, the school district may forfeit the benefit of a review under the rational basis test.

Other courts have addressed the issue of whether a school district has the authority to consider attendance in determining a student's grade. In *Slocum v. Holton Board of Education*,[12] the student, Slocum, challenged the school district's attendance policy which permitted a letter grade reduction for students who had a certain number of excused absences but who failed to attend the mandatory after-hours study sessions. Slocum argued, like Campbell, that the attendance policy constituted an *ultra vires* act and violated her rights to substantive and procedural due process. The court first noted that school districts in Michigan possess only those powers that statutes expressly, or by reasonably necessary implication, grant them.[13] A review of the school code in Michigan led the court to conclude that the statute implicitly authorized the policy which was neither arbitrary nor unreasonable.[14]

The court also rejected Slocum's due process arguments. She argued that she had been deprived of a liberty interest in "the recognition by state law of her right to accurately reflective academic evaluations."[15] The court soundly rejected this argument. Slocum's contention that she had "earned" a higher grade collapsed because, under the terms of the attendance policy, she had not completed the necessary requirements for a higher grade. The attendance policy had been drafted with an educational purpose—to assure that students receive the intangible benefits afforded by their classroom presence. The policy allowed teachers to consider attendance in the grading process and Slocum admittedly failed to comply with the attendance requirements. Therefore, the reduction of grades had not violated her substantive due process rights. The court also held that her procedural due process rights were not violated because she had notice of the policy and the opportunity to avoid its adverse effects by attending after-hours study sessions.

A more recent case took a step toward answering surely the most difficult question in every district: What constitutes an academic as opposed to a disciplinary sanction? In *State ex rel. Yarber v. McHenry*,[16] the relator, Yarber, sought review of a decision by the Mountain Grove School District denying him credit hours because of excessive absences. The specific issues related to venue and whether the Missouri Administrative Procedure Act (MAPA) applied to the case; however, to reach a decision regarding those issues, the court had to determine whether Yarber was entitled to a hearing under due process of law. Yarber contended that he had a protected property interest in his education, and the court agreed. The court recognized that the United States Constitution did not offer a fundamental right to education, but found that under *Goss*, a state-created property interest may arise out of certain statutes that provide for free public education and compulsory attendance.[17] Even a minor infringement on a student's right would trigger the protections required by *Goss*. However, the court recognized that the United States Supreme Court had qualified its decision in *Goss* with the *Horowitz* decision by determining that procedural due process does not require a hearing when the deprivation is for academic reasons rather than disciplinary reasons.[18] If the deprivation of right is for disciplinary reasons, the degree of the deprivation then becomes a factor in evaluating the level of process due.[19]

In order to determine the level of process due Yarber, the court had to decide whether the attendance policy was academic or disciplinary. To reach that decision, the court first had to make a preliminary determination: What is an academic sanction? The court looked to *Horowitz* for guidance and found that "if the sanction relates to the academic evaluation of the student, it is academic rather than disciplinary. Conversely, if the sanction does not bear upon the academic evaluation of the student, it is disciplinary rather than academic."[20] The school district policy stated that if the student failed to make up the absences, the student would lose credit for that semester. Although the student could avoid the sanction by making up the time in an after-hours study session, if the time was not made up, that student would lose credit already earned. The attendance policy was not structured to relate to academic performance and therefore was disciplinary in nature. The court found that given the policy's disciplinary nature, the student was entitled to a formal hearing.

These cases demonstrate the general rule that an educationally-based grade reduction policy will be upheld if it is carefully drafted, fairly applied and legally valid. The *Campbell* decision indicates what may be *improper* in a grade reduction policy:

- Reducing a student's grade for nonattendance as an additional punishment for unrelated conduct leading to suspension;
- Applying an attendance policy in an unreasonable, capricious, arbitrary or inequitable manner; and
- Barring a student from further class attendance and from taking a final examination.[21]

10. *Board of Curators of the University of Missouri v. Horowitz*, 435 U.S. 78, 86-87 (1978).
11. *Campbell*, 475 A.2d at 297.
12. *Slocum v. Holton Board of Education*, 429 N.W.2d 607 (Mich. App. 1988).
13. *Slocum*, 429 N.W.2d at 609.
14. *Id.*
15. *Slocum*, 429 N.W.2d at 611-12.
16. 915 S.W.2d 325 (Mo. 1995).
17. *Yarber*, 915 S.W. at 328.
18. *Yarber*, 915 S.W.2d at 329.
19. *Id.*
20. *Id.*
21. *Campbell*, 475 A.2d at 294.

Campbell also provides guidance on appropriate student attendance policies in its affirmation of the New Milford School District policy. Educators and attorneys should begin with *Campbell* when drafting grade reduction policies, but should take into account the unique facts and circumstances present in that particular policy that led the court to uphold its use.

ACADEMIC SANCTIONS FOR DISCIPLINARY INFRACTIONS

A majority of the cases addressing the issue of grade reduction policies focus on school district policies that reduce a student's grade based on disciplinary infractions. One of the strongest cases disapproving of this practice is *Katzman v. Cumberland Valley School District*.[22] While on a school-sponsored field trip, Katzman ordered and drank a glass of wine in a restaurant. After admitting her conduct, she was suspended for five days, removed from cheerleading and removed from the National Honor Society. Her grades were also reduced by 10% for each class in which she was enrolled. Katzman challenged the propriety of the grade reduction, and the trial court agreed with her, calling the penalty "excessive" and "harsh".[23] The appellate court went further in affirming the trial court by stating that reducing a student's grades for an entire quarter based on a single disciplinary incident was not reasonable and that such a policy would result in a misrepresentation of the student's grade. The court viewed this misrepresentation as an illegal act by the board.[24] The court opined that, in order to reduce a grade for disciplinary purposes, the infraction must be related to grading and evaluation, such as cheating or plagiarism.

In a more recent decision, a court has ruled that a school must be able to demonstrate a reasonable relationship between the student's misconduct and academic performance. In *Smith v. School City of Hobart*,[25] the court saw no connection between the student's misconduct and her academic performance and subsequently held the district's policy invalid as violating the student's substantive due process rights. Smith left school with two other girls to attend a class held in a medical center. On the way, the girls stopped off and drank beer at one of the girl's home. Smith admitted her violation and received a five-day suspension. Her grades were reduced 20% in each class according to the terms of the attendance policy, which classified suspensions as unexcused absences and called for a 4% reduction for each day of unexcused absence. Smith brought an action under 42 U.S.C. § 1983, challenging the policy. She argued that her constitutional right to substantive due process was violated by the reduction in her grades during her suspension.

The court found that the policy violated Smith's substantive due process rights because the district could not demonstrate a rational relationship between Smith's misconduct and her academic performance. The court used the same analytical framework as the other courts to determine how due process is affected by the school district's inherent right to set policy for the operation of the district. Instrumental to the decision was the undisputed fact that every day Smith sat on suspension served to reduce her grade by 4%, while the students who attended class on those days did not have 4% of their grades determined during the same time period.

The school district did not offer, and the court could not find, a reasonable connection between the consumption of alcohol and the 4% per day reduction in grade. Therefore, the court held that the school district had violated Smith's rights under 42 U.S.C. § 1983 by reducing her grades for nonacademic misconduct.

CONCLUSION

When drafting grade reduction policies school districts should ensure that they have an educational purpose. In order to qualify a grade reduction policy as an educational policy, the drafter should examine state statutes granting authority to school districts and craft the policy within statutory limits. School districts should be wary of imposing academic penalties for misbehavior unrelated to educational performance or evaluation and should avoid further grade reductions for nonattendance during disciplinary suspensions or expulsions. School districts should not automatically bar students who have been subjected to discipline from further class attendance, making up missed work or taking final examinations.

22. 479 A.2d 671 (Pa. Commw. 1984).
23. *Katzman*, 479 A.2d at 673.
24. *Katzman*, 479 A.2d at 675.
25. *Id.*
26. 811 F. Supp. 391 (N.D. Ind. 1993).

Case Notes

Evidence that principal and school board were motivated by religious concerns regarding the teaching of New Agrism was sufficient to support the jury's verdict for the teacher in a mixed motive discrimination case under title VII. District court did not abuse its discretion in granting teacher relief in the form of two years front pay rather than reinstating her because it concluded that the principal-teacher relationship had been so damaged it could not be reestablished and front pay satisfies the make-whole purposes of title VII.

Coram v. Strafford R-VI School District, No. 96-3010 (8th Cir. April 7, 1998)

http://caselaw.findlaw.com/cgi-bin/getcase.pl?court=8th&navby=case&no=963010P

On the last day of school, a second grade teacher gave each of her students a "magic rock" letter with a rock attached. Prior to the new school year, the principal informed the teacher that she had received complaints from parents concerning the "magic rock" letter and cautioned the teacher to avoid magical ideas in her teaching. She was also told she needed to improve her interpersonal relationships with parents and instructional process. The principal informed the superintendent of the concern the letter had caused in the community, and the superintendent informed the school board. The principal subsequently held a staff meeting during which she discussed the community's perception on teaching New Agrism and instructed teachers to avoid magical notions in their teaching. She also announced that a local minister was giving a seminar devoted to the issue of New Agrism and its infiltration into the public schools. In addition, several members of the religious community expressed their concern about New Agrism in the public schools. When the teacher's contract came up for renewal, the school board voted not to renew. The teacher filed suit alleging that the nonrenewal violated her rights under title VII and the First Amendment.

The district court denied the school district's motion for summary judgment and the case went to trial. The jury returned a verdict for the teacher on the title VII claim and awarded damages. It also found for the teacher on the First Amendment claim, but did not award damages. Instead of reinstating the teacher, the district court awarded her two years front pay. Both parties appealed the court's rulings.

Turning to the issue of whether the teacher's evidence was sufficient to sustain the jury's verdict, it noted that an employee is entitled to have her case analyzed under the *Price Waterhouse* mixed motives standard if she presents "evidence of conduct or statements by persons involved in the decision making process that may be viewed as directly reflecting the alleged discriminatory attitude." While it questioned whether the teacher had properly pled a *prima facie* case of religious discrimination, it concluded that the principal's conduct in response to the community's fears of New Agrism's infiltration of the schools coupled with her unsupportive conduct toward the teacher provided the jury with sufficient evidence to find that the principal was motivated by religious concerns regarding the teaching of New Agrism. The appellate court pointed out that the school district's evidence of the teacher's poor performance based on discrepancies between her students' grades and their scores on standardized tests could have been discounted by the jury because of the other teachers' testimony that standardized test scores are not a good measurement of teacher performance. Although the principal was not a voting member of the board, because her recommendation not to renew the teacher's contract was given great weight by the board, the jury could have reasonably concluded that the principal's hostility toward the teacher infected the board's decision making process. The appellate court then addressed the teacher's argument that the trial court erred when it failed to reinstate the teacher because reinstatement is the appropriate form of relief in employment discrimination cases. While the court acknowledged

that reinstatement is the preferred remedy, it stated that the present case involved extraordinary circumstances that justified the district court's refusal to reinstate. The district court correctly concluded that the relationship between the principal and teacher had been so damaged, it could not be reestablished. As a consequence, it agreed with the district court's award of two years front pay as satisfying the make-whole purposes of title VII.

Student is not entitled to compensatory or punitive damages under IDEA for school district's educational malpractice based on negligent failure to diagnose student's learning disability. Student's allegation of negligent failure to his diagnose learning disability is insufficient to establish discrimination within the meaning of section 504. Student can not maintain a cause of action against school district under section 1983 for IDEA violations.

Sellers v. School Board of the City of Manassas, No. 97-1762 (4th Cir. April 13, 1998)

http://caselaw.findlaw.com/cgi-bin/getcase.pl?court=4th&navby=case&no=971762P

After a high school student was diagnosed as learning disabled and emotionally disturbed, his parents filed suit against the school district for failure to diagnose the student's learning disability earlier. The parents sought compensatory and punitive damages for violations of IDEA, section 504 and section 1983. They alleged that the student's test scores going back to fourth grade should have alerted the school district of the need to test the student for learning disabilities. The district court, characterizing the parent's suit as one for educational malpractice, dismissed the claims for failure to state a cause of action. The parents appealed.

The parents argued that they were entitled to compensatory and punitive damages based on two violations of IDEA by the school district. First, the school district failed to perform its duty to identify, locate and evaluate disabled children. Second, because the student had not been receiving special educational services previously, the school district had not provided him with a free appropriate public education. The appellate court agreed with the district court that the parents' IDEA claim was indistinguishable from a claim for educational malpractice. Relying on its holding in *Hall v. Vance County Board of Education*, 774 F.2d 629 (4th Cir. 1985), it held that they were barred from recovering for such a claim under IDEA. It stated that "tort-like damages are inconsistent with IDEA's statutory scheme." The court pointed out that the purpose of IDEA's procedural mechanism is to protect the right to free appropriate education, not to provide a forum for tort claims, such as educational malpractice. It stated that allowing such claims runs counter to the legislative scheme designed to encourage prompt resolution of special education disputes. It also found that awarding of compensatory and punitive damages under IDEA would "present acute problems of measureability."

The appellate court moved on to the parents' contention that they are entitled to damages based on violation of section 504. Finding this was in essence a negligence claim, the court ruled that section 504 requires something more than mere negligence. It held that proof of failure to provide a free appropriate public education as required by IDEA would not be sufficient to establish discrimination within the meaning of section 504. In the court's opinion, it would take more than an incorrect evaluation or substantively faulty IEP in order for liability to exist under section 504.

The parents' last point on appeal was that they should recover compensatory and punitive damages under section 1983 premised on the school district's IDEA violations. The appellate court held that parties may not bring an action under section 1983 for an IDEA violation. Based on *Smith v. Robinson*, 468 U.S. 992 (1984), the court concluded that the parents were barred from circumventing IDEA's limits on remedial relief by utilizing section 1983 to assert IDEA violations. It rejected the parents' argument that section 1415(f) was enacted in response to the *Smith* decision, demonstrating a clear congressional intent that plaintiffs be allowed to sue under section 1983 for IDEA violations. After reviewing the statute's language and legislative history, it concluded that nothing in section 1415(f) overruled that part of the decision in *Smith* that held that Congress had intended IDEA to provide the sole remedies for violations of that same statute.

Congress abrogated the states' Eleventh Amendment immunity, when it enacted the 1974 amendment to ADEA because: the expanding of the definition of employer to include a state or any of its political subdivisions constituted an unequivocal expression of Congress' intent to abrogate the immunity; and Congress' enactment of the amendment was a valid exercise of its enforcement powers under section 5 of the Fourteenth Amendment, even though age does not constitute a suspect classification.

Goshtasby v. Board of Trustees of University of Illinois No. 97-2297 (7th Cir. April 13, 1998)

http://caselaw.findlaw.com/cgi-bin/getcase.pl?court=7th&navby=case&no=972297A

When a professor of engineering was denied tenure, he filed suit alleging age discrimination in violation of the ADEA. The university moved to dismiss the complaint on the ground that it was barred by the Eleventh Amendment. Citing circuit precedent, the district court denied the motion. On appeal, the university argued that Congress' attempt to abrogate the states' sovereign immunity in the 1974 amendment to the ADEA was unconstitutional. Relying on *Seminole Tribe*, it contended that Congress failed to abrogate the university's Eleventh Amendment immunity pursuant to a valid exercise of power under section 5 of the Fourteenth Amendment when it extended the ADEA to the states.

The Seventh Circuit panel affirmed the district court's denial of the motion to dismiss. It held that the 1974 amendment to the ADEA was a constitutionally valid exercise of Congress' section 5 powers under the Fourteenth Amendment, abrogating the university's Eleventh Amendment immunity. The panel analyzed the ADEA amendment in light of *Seminole Tribe*'s two prong test: (1) whether Congress has unequivocally expressed its intent to abrogate the immunity; and (2) whether Congress has acted pursuant to a valid exercise of power. It rejected the university's argument that merely expanding the definitions of employer to include the states and of employee to include those with state civil service status was insufficient to satisfy the first prong. It found that the university had failed to provide a compelling reason for overruling the circuit's precedent established in *Dunlavson v. Board of Governors of State College & Univrs.*, 920 F.2d 441 (7th Cir. 1990), by adopting a "new strict view" which requires application of the higher "unmistakably clear" standard in order to establish the intent to abrogate. As a result, the panel reaffirmed the Seventh Circuit's position that Congress made its intention to abrogate the states' sovereign immunity unmistakably clear in the ADEA's 1974 amendment.

Regarding the second prong of the *Seminole Tribe* test, the university argued that the circuit's holding in *EEOC v. Elrod*, 674 F.2d 601 (7th Cir. 1982), should be overruled. First, the university argued that the court in *Elrod* erred in concluding that Congress enacted the 1974 amendment pursuant to section 5 of the Fourteenth Amendment because Congress did not expressly state it was using section 5. In the alternative, the university argued that, based on the Supreme Court's decision in *City of Boerne*, Congress exceeded its power under section 5 when it enacted the 1974 amendment because it created a substantive right, *i.e.* right to be free from age discrimination, which had not been previously recognized by the Supreme Court. The panel again found that the university had failed to present a compelling reason for overturning the holding in *Elrod* that Congress need not expressly state it is acting under its section 5 powers. The panel also rejected the alternative argument that Congress exceeded its section 5 enforcement power when it extended protection from age discrimination as a substantive right enforceable through the equal protection clause. It reaffirmed the circuit's position in *Elrod* that rejected the contention that Congress cannot rely on its section 5 enforcement power to legislate a stricter standard of conduct when the Supreme Court has declined to use a suspect classification analysis. Finally, the panel disposed of the university's contention based on the holding in *City of Boerne v. Flores*, 138 L. Ed 624 (1997), that section 5 cannot support the 1974 amendment because the act is so out of proportion with the problem it seeks to remedy. It found that the ADEA was unlike the statute in *City of Boerne* because it was narrowly drawn to protect older citizens from arbitrary and capricious action by the state.

Parents, who unilaterally placed student suffering from perseverative disability disorder in a private residential educational program, were not entitled to tuition reimbursement because the evidence established that the IEP was reasonably designed to permit the student to receive educational benefits as required by IDEA.

Walczak v. Florida Union Free School District, No. 97-7155 (2nd Cir. April 16, 1998)

http://law.touro.edu/2nd Circuit/April98/97-7155.html

Parents of student who had been attending a special education program at a public school challenged new IEP, arguing that placement in a residential facility was necessary to achieve the student's academic and social goals. Both parties presented extensive testimony, during which one of the parents' experts stated that the proposed IEP placement would meet the student's educational and social needs, but that the residential facility would be better. The hearing officer upheld the IEP. The parents then removed the student from the public school and placed her in a residential facility and appealed the hearing officer's decision to the state education department. A state review officer upheld the public school placement. The parents filed suit alleging violation of IDEA for the failure to develop an IEP reasonably calculated to afford the student educational benefits. The district court deemed the school district's motion for summary judgment and *sua sponte* entered judgment for the parents, adopting the conclusions asserted by them in their brief without any particular factual findings.

The appellate court reversed the district court and remanded with instructions to enter summary judgment for the school district. It stated that the standard of judicial review in IDEA cases required the district court to conduct an independent review of the IEP without "impermissible meddling" in the school district's methodology, while giving the findings from the administrative proceedings due weight. It noted that the district court had relied on only the parents' brief in concluding that it would be impossible for the student to make satisfactory progress while placed in the public school program. The appellate court found that an objective review of evidence revealed that the student had made significant academic and social progress while in the public school program. It concluded that the record did not support the district court's ruling that a residential placement was essential to provide the student with an appropriate public education.

Student-teacher's ADA and section 504 claims were barred by the state's statute of limitations for personal injury actions which is the most analogous state statute of limitations.

Everett v. Cobb County School, No. 97-8076 (11th Cir. April 16, 1998)

http://caselaw.findlaw.com/cgi-bin/getcase.pl?court=11th&navby=case&no=978076OP.

Student teacher suffered from multiple sclerosis requiring her to use an electrically powered scooter for mobility. In the spring of 1994, she began her teaching assignment at an elementary school. The classroom teacher to whom she was assigned made frequent comments about her disability and refused to allow her to use the scooter. In addition, the classroom teacher expressed the opinion that she doubted that the student teacher would be a good teacher because of her disability. The classroom teacher gave the student-teacher a grade of unsatisfactory on her classroom assignment. On May 31, 1994, the university decided to change her grade to an incomplete and allow her to repeat the assignment the next year. On June 6, 1994, she received a letter confirming the faculty's decision. On June 6, 1996, the student-teacher filed suit alleging discrimination on the basis of her disability in violation of title II of the ADA and section 504, along with state claims based on breach of contract. The school district moved to dismiss the federal claims based on the statute of limitations. The district court granted the motion. It held that the state's two year statute of limitations applied to her discrimination claims and that she failed to file suit within two years of the discriminatory acts alleged.

On appeal, the Second Circuit affirmed the district court's decision to apply the state's two year personal injury statute of limitations to ADA and Section 504 claims. Noting that the causes of action brought under the ADA and section 504 were essentially the same, the panel concluded that the same statute of limitations should apply to both. It observed that most circuits that had adopted a statute of limitations for ADA or section 504 claims had looked to the state's limitations period for personal injury actions. Following the other circuits' lead, it applied the state's two year statute of limitations period for personal injury actions to discrimination claims brought under title II of the ADA and section 504. Addressing the issue of whether the student-teacher had filed her complaint within the applicable two year period, the panel rejected her argument that the statute did not begin to run until June 6, 1994 when she received the confirmation letter from the faculty. It held that claims of discrimination accrue when a plaintiff is informed of the discriminatory act. Based on the facts, it found that the student-teacher was informed on May 31, 1994 when the faculty rendered its decision to change her grade. Therefore, her claims were barred by the applicable two year statute of limitations.

Teacher unable to attend school on a regular basis at the time he was terminated was not a qualified individual within the meaning of the ADA because he could not perform the essential functions of his position with or without reasonable accommodation.

Nowak v. St. Rita High School, No. 97-2097 (7th Cir. April 24, 1998)

http://www.kentlaw.edu/7cir/cir.1998/apr/97-2097.html

Teacher at parochial high school experienced a series of severe health problems that forced him to go on sick leave for extended periods of time. Following surgery to amputate a leg, the teacher was unable to return to the classroom for approximately eighteen months. During this period, he applied for and began receiving social security disability benefits. When the school administrators decided to terminate the teacher's employment, he filed suit alleging violation of both the ADA and breach of contract. The district court granted the school's motion for summary judgment on both claims. The teacher appealed dismissal of his ADA claim.

The appellate court affirmed the district court's decision. It held that the teacher had failed to present sufficient evidence to demonstrate that he was a qualified individual at the time of his termination within the meaning of the ADA. The court rejected the teacher's argument that the school's admission that he had the skills to perform the job with reasonable accommodation, demonstrated that he was a qualified individual. It found the argument off the mark because the issue was not whether he had the requisite teaching skills, it was whether the teacher was capable of being present in the classroom on a regular basis at the time the school decided to terminate him. It found that nothing in the teacher's actions during the eighteen months or his medical records supported his contention that he was ready, willing and able to return to the classroom, and that he communicated such to the school.

Congress abrogated the states' Eleventh Amendment immunity from suits brought under title IX when it enacted its amendment extending title IX coverage to the states because: the amendment expressed Congress' unequivocal intent to abrogate the immunity; and Congress acted pursuant to a valid exercise of power under section 5 of the Fourteenth Amendment to proscribe gender discrimination in education.

Franks v. Kentucky School for the Deaf, No. 97-5675 (6th Cir. April 24, 1998)

http://www.law.emory.edu/6circuit/apr98/98a0124p.06.html

Female student was harassed and threatened by a male student on several occasions. Although she reported the incidents to school authorities, no action was taken. The male student later raped her at knife point during a school trip. The student and her mother filed suit against the school, the state board of education, and three state employees in their official capacities, alleging sexual harassment based on hostile environment in violation of title IX. The district court denied the school's motion for judgment on the pleadings or alternatively a motion for summary judgment. It ruled that in enacting title IX, Congress had properly abrogated the states' Eleventh Amendment immunity. The school brought an interlocutory appeal challenging whether it can be sued under title IX in federal court. The student argued that the defendants may be sued under title IX because Congress abrogated the states' Eleventh Amendment immunity, and the defendants waived their immunity by accepting federal funds.

The Sixth Circuit affirmed the district court. It applied the *Seminole Tribe* test to the congressional amendment extending title IX coverage to the states. Turning to the first prong, it found that the explicit language of the amendment clearly satisfied the requirement that Congress unequivocally express its intent to abrogate the immunity. Regarding the second prong, the panel stated that section 5 of the Fourteenth Amendment is the only constitutional provision recognized by the Supreme Court as granting Congress the power to abrogate the states' immunity. Applying this principle to title IX, it noted that Congress did not expressly invoke the authority of section 5 when it enacted the amendment. However, the panel pointed out that Congress need not have the specific intent to legislate pursuant to its section 5 power, so long as it had the actual authority as an objective matter. The panel found that section 5 grants Congress the authority to enforce the Fourteenth Amendment's substantive provisions which proscribe, among other conduct, gender

discrimination in education. It, therefore, concluded that since title IX proscribes gender discrimination in education, Congress had the authority pursuant to section 5 to make title IX applicable to the states.

Congress did not abrogate the states' Eleventh Amendment immunity for suits under the ADEA because the language in the 1974 amendment to the ADEA was merely a general application of the statute to the states which did not constitute an unmistakably clear statement by Congress of intent to abrogate the immunity. However, Congress did abrogate the states' Eleventh Amendment immunity for suits under the ADA.

Kimel v. State of Florida, No. 96-2788 (11th Cir. April 30, 1998)

http://caselaw.findlaw.com/cgi-bin/getcase.pl?court=11th&navby=case&no=962788OPN

Three district court cases were consolidated on appeal because of the common issue raised. In two of the cases the defendants moved to dismiss the plaintiffs' ADEA claims on the ground that the claims were barred by Eleventh Amendment immunity. The third case involved a claim under the ADA. In one of the ADEA cases and the ADA case the respective district courts denied the motion to dismiss. However, in the other ADEA case the district court granted the defendant's motion to dismiss.

An Eleventh Circuit panel ruled that the ADEA claims were barred by Eleventh Amendment immunity, while the ADA had properly abrogated the states' Eleventh Amendment immunity. The court held that the ADEA failed to satisfy the first prong of the *Seminole Tribe* test because the language of the statute lacked an unmistakably clear statement that demonstrated Congress' intent to abrogate. It pointed out that there was no reference to the Eleventh Amendment or to the states' sovereign immunity in the text. In addition, the majority noted that the text lacked a plain, declaratory statement that states can be sued by individuals in federal court. It rejected plaintiffs' argument that the 1974 amendment to the ADEA, expanding the definition of employer to include states and their political subdivisions, constituted an unmistakably clear statement demonstrating Congress' unequivocal intent to abrogate the Eleventh Amendment. It concluded that the amendment was merely a general authorization for suit in federal court insufficient to satisfy the requirement of unequivocal statutory language. Addressing the ADA claim, the court held that it abrogated the states' Eleventh Amendment immunity. It found that the ADA satisfied both prongs of the *Seminole Tribe* test.

School officials were not entitled to qualified immunity from claim of student-to-student sexual harassment in violation of title IX, where they knew of the hostile environment and failed to take reasonable steps to remedy it. School officials were also not entitled to qualified immunity from claim of teacher-to-student sexual harassment in violation of title IX based on the failure to supervise where school officials were aware of the teacher's conduct and failed to prevent it.

Oona v. McCaffrey, No. 96-16026 (9th Cir. May 5, 1998)

http://caselaw.findlaw.com/cgi-bin/getcase.pl?court=9th&navby=case&no=9616026.p

Sixth grade female student was subjected to inappropriate touching and comments by a male student teacher. In addition, she was subjected to harassment of a sexual nature and was physically assaulted on one occasion by male classmates. Some of the student teacher's conduct occurred in the presence of his supervising classroom teacher and the principal. When the student's parents demanded that the principal remove the student teacher, he refused to do so. In addition, when the parents complained about the male students' conduct, the teacher retaliated against the student by lowering a grade and withholding awards she had won. The parents filed suit under section 1983, alleging both student-to-student and teacher-to-student sexual harassment creating a hostile environment in violation of title IX. The district court denied the school officials' motion to dismiss on the grounds of qualified immunity. The officials filed an interlocutory appeal.

The appellate court's sole focus was on whether the school officials were entitled to qualified immunity from title IX claims based on teacher-to-student and student-to-student sexual harassment. The court stated that the student's right under the equal protection clause to be free from intentional sex discrimination by a state actor was clearly established at the time of the alleged sexual harassment. It noted that after the Supreme Court's decision in *Franklin*, several circuits had applied title VII to teacher-to-student sexual harassment claims under title IX. The court also pointed out that the Fourth and Seventh Circuits recognized title IX claims of hostile environment based on both teacher-to-student and student-to-student sexual harassment. Based on *Franklin*, it held that the school officials were not entitled to immunity for their failure to take steps to remedy the hostile environment caused by the student-to-student sexual harassment. While acknowledging that the Fifth and Eleventh Circuits have refused to recognize claims of student-to-student sexual harassment under title IX, the appellate court rejected the argument that school officials are being held vicariously liable under agency principles for the conduct of students. It emphasized that school officials were being held liable only for their own discriminatory actions, resulting from their failure to address adequately a known hostile environment. As a result, the court held that school officials have a duty to take reasonable steps to remedy a known hostile environment created by student-to-student sexual harassment. Regarding the teacher-to-student sexual harassment claim, it found that the student had alleged sufficient facts to establish that the officials knew of the student teacher's behavior and failed to prevent it. Therefore, it held that the school officials in their supervisory positions were not entitled to immunity because the allegations constituted sex discrimination in violation of the student's federal rights under title IX.

Teacher failed to state a cause of action based on violation of his liberty interest for defamation by public officials because he was unable to allege facts sufficient to show that public officials made false stigmatizing statements about him. Teacher's procedural due process claim failed because he was unable to show that the state's post-deprivation remedies do not satisfy due process. Teacher failed to state a cause of action for intentional infliction of emotional distress because he was unable to allege facts to show that the school officials engaged in extreme and outrageous conduct.

Strasburger v. Board of Education, Hardin County Community Unit School District No. 1, No. 97-1302 (7th Cir. May 4, 1998)

http://caselaw.findlaw.com/cgi-bin/getcase.pl?court=7th&navby=case&no=971302

Industrial arts teacher also served as the boys basketball coach and athletic director. The board learned that the teacher had a criminal record, including convictions for criminal trespass and disorderly conduct and charges of sexual abuse and burglary. Copies of his criminal record were circulated in the community and a derogatory letter about him was placed on vehicles. In addition, rumors spread that the teacher was a rapist. The school board met and suspended the teacher with pay from his coaching and athletic director duties, but allowed him to continue teaching. The teacher was given no notice or hearing prior to the suspension. The board's stated reasons for the suspension were that it was investigating allegations that the teacher had, taken kick backs from an athletic shoe company that supplied the county and that he had entered into a contract without board authorization. The board also wanted to conduct further investigations regarding the teacher's criminal record. Following the board's investigation, he was reinstated to his coaching and athletic director duties. Approximately four months later, the teacher was honorably discharged by the board in accordance with the state's reduction-in-force procedure. Following his discharge, the teacher was unable to find any coaching positions. The teacher filed suit against the school board under section 1983, alleging violation of his liberty interest, violation of his substantive and procedural due process rights, and intentional infliction of emotional distress. The district court granted the school board summary judgment on all claims.

The appellate court affirmed the district court's decision. Addressing the teacher's liberty interest claim, it stated that it is well settled law that state employees have a liberty interest in not being discharged from their employment while being defamed such that they are unable to find other government employment. The court pointed out that an employee must show that a public official made defamatory statements which are false. It noted that true but stigmatizing statements, opinions, rumors, and statements made by public officials would not suffice. Testing the teacher's allegations against this requirement, it concluded that none of the false defamatory statements were attributable to school members. It found that the source of the letter left on cars was unknown. The other statements amounted to rumor or opinion.

and the teacher was unable to show that a public official had uttered any of them. Finally, while the disseminating of the teacher's criminal record was stigmatizing, it contained true information.

Turning to the due process property interest claims, the appellate court found that the teacher had failed to properly raise the substantive due process claim. It found his arguments, that the school board failed to give him notice and a hearing, were more properly categorized as violations of procedural due process. Since the teacher was not challenging the constitutionality of the state's reduction-in-force procedure, the court stated that in order for the teacher to establish a failure of due process, he would have to show that school officials acted in a "random and unauthorized" manner in depriving him of his protected interest. It indicated that the teacher was required to demonstrate that the state's post-deprivation remedies fail to satisfy due process. Reviewing his allegations, it concluded that the teacher failed to show that the state's post-deprivation remedies are constitutionally deficient. Regarding the teacher's claim of emotional distress, the court found that the school board's conduct was not of the "outrageous" nature contemplated by state tort law.

Principal, who reported complaints of African-American teacher's use of corporal punishment to school district officials in accordance with district policy, was not liable under section 1983 for violating the teacher's equal protection rights, where the principal's actions did not proximately cause the teacher's suspension.

Taylor v. Brentwood Union Free School District, No. 97-7481 (2d Cir. May 6, 1998)

http://law.touro.edu/2nd/circuit/May98/97-7481.html

Two students reported to the principal that an African-American teacher had used corporal punishment to discipline them. In accordance with school district policy, the principal filed a report concerning the incidents with the director of employee relations and planning. District officials instructed the director to conduct investigations of the two incidents. After the investigations, the director recommended that disciplinary charges be filed against the teacher. The school board approved the charges, and a hearing was conducted before a disciplinary panel. The panel voted to impose a one year suspension without pay on the teacher. The teacher's administrative appeal was dismissed by the state commissioner of education. The teacher filed suit under section 1983, alleging that he was suspended because of his race in violation of the equal protection clause and that the suspension violated his right to free speech. Following the close of the teacher's case, the district court dismissed the First Amendment claim. The jury returned a verdict in favor of the teacher against only the principal on the equal protection claim.

On appeal the principal argued that she did not proximately cause the teacher's suspension because his suspension was based on the director's independent investigations and findings, the school board's decision to bring charges, the panel's decision to suspend the teacher, and the commissioner's denial of the teacher's administrative appeal, and that these intervening acts broke the causal connection between the principal's reporting of the incidents involving the teacher to the school district and the decision to suspend him. The appellate court agreed with the principal's argument. It reversed and remanded with instructions for the district court to enter judgment as a matter of law for the principal. It cited *Jeffries v. Harleston*, 52 F.3d 9 (2d Cir. 1995), as controlling authority for the proposition that even though the actions of certain defendants constituted racial discrimination, they were not liable under section 1983 because their actions could not be considered the cause of the injury suffered by the plaintiff. The court found the situation of the principal indistinguishable from that of the defendants in *Jeffries*. Based on the record, it found whatever ill motives the principal may have had had no impact on the decision to suspend teacher because the actions of the director, superintendent, school board, disciplinary panel, and commissioner broke the causal link between any racial animus on the principal's part and the suspension.

Parents' appeal to district court from adverse ruling by state hearing officer for tuition reimbursement under IDEA for the 1993-1994 school year was barred by state statute of limitations specifically applicable to appeals from administrative proceedings under IDEA. However, parents were entitled to tuition reimbursement under IDEA for the 1994-1995 school year based on inadequacies in the IEP. The student's placement in a private school that does not meet IDEA's mainstreaming requirement does not bar the parents from receiving reimbursement.

Cleveland Heights-University Heights City School District v. Boss, Nos. 96-4333/4376 (6th Cir. May 6, 1998)

http://caselaw.findlaw.com/cgi-bin/getcase.pl?court=6&navby=case&no=980133p

After parents received their child's third grade Iowa Basic Skills Test scores, they requested that the student be tested for a learning disability, but the school failed to test her before the end of the third grade school year. During the summer, the parents requested a waiver from the school district to allow the student to receive special education even though testing for a learning disability had not been done and also located a private school that could provide the student with individualized instruction. When the school district was unable to act on the waiver request before the private school started, the parents enrolled the student at the private school. The school district's subsequent testing of the student indicated that she had a specific learning disability. Because the student was attending a private school, both parties agreed to postpone development of a new IEP for the following year until May of 1994. When the parents were presented with the IEP for the 1994-1995 school year, they refused to sign it, citing a number of reasons, particularly that it failed to provide an objective way to measure the student's progress. The dispute regarding the IEP went unresolved, and the parents re-enrolled the student in the private school for 1994-1995. The parents' request for tuition reimbursement for the 1993-1994 and 1994-1995 school years was denied by the school district. At an administrative hearing, a state hearing officer ruled that they were entitled to tuition reimbursement for both years. The school district appealed to a state review officer who reversed the hearing officer's order to reimburse for 1993-1994 school year, but upheld the hearing officer's order regarding reimbursement for 1994-1995. Both parties appealed the respective adverse rulings. The district court denied the school district's motion to dismiss the parents' appeal for tuition reimbursement for the 1993-1994 as time barred. However, it did uphold the review officer's ruling denying the parents reimbursement for 1993-1994. The district court also upheld the review officer's ruling requiring reimbursement for the 1994-1995 school year. Both parties again filed appeals.

The appellate court agreed with the school district that the parents' appeal of the review officer's ruling regarding reimbursement for 1993-1994 was time barred. It rejected the parents' reliance on *Janzen v. Knox County Board of Education*, 790 F.2d 484 (6th Cir. 1986), on two grounds. First, the present case involved an appeal from an administrative appeal, not an original action as in *Janzen*. Second, in the present case, a specific state statute of limitations applied to appeals from administrative proceedings in actions under IDEA.

The appellate court then turned to the school district's contention that it was not liable for the student's 1994-1995 private school tuition. The court found that both administrative officers and the district court agreed that the IEP had failed to provide appropriate objective criteria for measuring the student's progress as required by IDEA. Applying the due weight standard of review to the facts supporting this finding, it held that there was ample evidence to support the conclusion that the violation was more than merely technical and that it went to the heart of the IEP's substance. Addressing the issue of whether IDEA's mainstreaming requirement could act as a bar to reimbursement, the appellate court noted it was an issue of first impression. It found guidance in two Supreme Court decisions. In *Burlington v. Department of Education*, 471 U.S. 359 (1985), the Court held that the fact that the parents had violated IDEA's "stay put" provision did not bar reimbursement. In *Florence County School District Four v. Carter*, 510 U.S. 7 (1993), the Court again refused to bar reimbursement when the private placement selected by the parents failed to comply with the FAPE requirements under section 1401(18) of IDEA. In the appellate court's opinion both decisions made clear that Congress intended IDEA to provide "*both* a free *and* an appropriate education for disabled children" without IDEA being read as providing one of these benefits at the expense of the other. It concluded that IDEA was not intended to force parents to choose between the unsatisfactory alternatives of leaving the child in a school providing an inadequate education or placing the child in a private school that provides an appropriate education without an opportunity for reimbursement.

EEOC right-to-sue letter is a condition precedent, rather than jurisdictional requirement, to title VII claim. However, teacher's title VII claim was barred by res judicata, even if the dismissal of the prior suit did not reach the merits of the title VII claim, because the district court's granting of summary judgment on all of the teacher's federal claims involving age and race discrimination constituted a final decision on the merits not only as to legal theories the teacher pled, but as to any legal theory that she could have raised and litigated.

Rivers v. Barberton Board of Education, No. 96-4404 (6th Cir. May 11, 1998)

http://caselaw.findlaw.com/cgi-bin/getcase.pl?court=6th&navby=case&no=980141p

Teacher filed suit against the school board, alleging race and age discrimination, including a claim under title VII. At the time the teacher filed suit, she had not obtained a right-to-sue letter from the EEOC for the title VII claim. The district court granted the board summary judgment on all federal claims. In dismissing the title VII claim, the district court held that it had jurisdiction over the claim even in the absence of the right-to-sue letter. It stated that the right-to-sue letter is a condition precedent subject to equitable modification. The teacher filed a second suit which mirrored the allegations in first one, including the title VII claim. The district court granted the board's motion for summary judgment on all claims on the grounds of res judicata. The teacher appealed only the title VII claim.

Although the Sixth Circuit agreed with the district court that an EEOC right-to-sue letter is a condition precedent, rather than a jurisdictional requirement, to a title VII action, it did not reach the issue of whether dismissal of a cause of action for failure to satisfy such a condition precedent constitutes adjudication on the merits for purposes of res judicata. The court instead found that it was immaterial whether the title VII claim was dismissed on the merits in the first suit, if some portion of the first cause of action was dismissed on the merits. It pointed out that the race discrimination claim in the first suit was premised on several theories, including sections 1981 and 1983. When that claim was dismissed with prejudice, it constituted a final decision on the merits not only as to those legal theories, but as to any other legal theory under which the race discrimination claim could have been litigated. It stated that there were two compelling reasons for finding res judicata as to the title VII claim. First, since the teacher pled the title VII theory from the beginning, there was no requirement for her to seek leave to amend the complaint. Second, the teacher had the right under the statute to obtain the right-to-sue letter immediately because she filed the suit more than 180 days after filing her EEOC claim. Therefore, the teacher had the opportunity and the burden of perfecting her title VII claim during the pendency of the first suit.

School board did not deprive teacher of his due process rights when it failed to comply with the procedural requirements of the state school code and the state's open meeting act at the time it gave notice of dismissal because as a non-tenured teacher he had no property interest in his job under state law. Teacher had no cause of action under section 1983 based on violation of his First Amendment rights because he failed to allege the specific protected speech or activity that he engaged in that caused the school district to retaliate. Teacher failed to allege facts sufficient to show a violation of his civil rights under section 1985(3) because he failed to plead that the school board's dismissal was the result of a conspiracy motivated by racial or other class-based animus.

Kyle v. Morton High School, District 201, No. 97-2081 (7th Cir. May 11, 1998)

http://caselaw.findlaw.com/cgi-bin/getcase.pl?court=7th&navby=case&no=972081

Teacher, employed by school district as director of community education and assistant to the superintendent, was honorably dismissed by school board as a cost cutting measure. The teacher filed suit alleging: (1) that the school district's failure to comply with the state school code and state open meeting act's requirements constituted violation of his procedural and substantive due process rights; (2) that his termination for political and advocacy reasons violated his First Amendment freedom of speech and association rights; and (3) that the school district along with other unnamed individuals engaged in a conspiracy to injure the teacher in retaliation for his political advocacy in violation of section 1985(3). The district court granted the school district's rule 12(b)(6) motion to dismiss all three counts.

The appellate court affirmed. It agreed with the district court that the teacher's procedural due process rights were not violated by the school district's failure to comply with requirements of the state school code regarding notice of dismissal to non-tenured teachers because under state law the teacher had no property interest in his job. The appellate court then examined the teacher's substantive due process claim. It found nothing in the language of the open meetings act that imposed substantive limitations on the termination of state public employees. However, the court concluded that the teacher was actually arguing that because of the school district's procedural lapses regarding his dismissal, the district's termination was not effective. As a result, under state law he was not terminated, and obtained tenure because of the district's failure to terminate him. Consequently, when the school district failed to offer him a contract for the next school year, it deprived him of his constitutionally protected property right. In rejecting this argument, the appellate court characterized it as a complaint that the school district prevented the teacher from acquiring a property right. While it conceded that the procedural lapses were a deprivation of sorts, it was not of a magnitude giving rise to a cause of action under section 1983. The court concluded that to recognize such a deprivation would erode the distinction between substantive rights enjoying constitutional guarantees and deprivations of procedural interests under state law.

The court next examined count two. It pointed out that in order for a plaintiff to avoid dismissal of a First Amendment retaliation claim, he must allege facts showing that the speech he engaged in was constitutionally protected under the circumstances, and the defendant(s) retaliated against him because of it. The appellate court relying on extensive case law within the circuit, held that because the teacher failed to allege the specific speech or activities he engaged in that led the school district to retaliate, he failed to plead facts sufficient to give the school district fair notice of his claim and the grounds upon which it was based. It also held that count three failed because the teacher failed to allege that the defendants conspired based on racial or class based animus to injure him in retaliation for his political advocacy in violation of section 1985(3).

Parents were barred from recovering expert witness fees incurred during state administrative hearing under section 1415 of IDEA because such fees do not fall within the statutory definition of attorneys' fees. Parents were also barred from recovering expert witness fees under section 1988 because section 1988 does not apply to a separate cause of action brought solely to recover attorneys' fees.

Eirschele v. Craven County Board of Education, No. 4:97-CV-217-H2 (E.D.N.C. May 20, 1998)

Parents, dissatisfied with the school system, sent their son who has ADHD, to live with grandparents in another state and attend school there. The parents then filed an administrative action alleging that the local school district had failed to provide their son with a free appropriate public education in violation of IDEA. After a state review officer upheld the administrative law judge's decision that the local school district's IEP was inappropriate, and that the out of state placement was appropriate, the parents filed suit to recover attorney's fees, costs, paralegal fees, and expert witness fees incurred while litigating their IDEA claims pursuant to section 1415 of IDEA and section 1988. The school district moved to dismiss the parents' claims for expert witness fees under both sections 1415 and 1988.

The district court dismissed the claims for expert witness fees under both sections 1415 and 1988. Noting that none of the circuits had ruled on the issue of whether expert witness fees are "costs" within the meaning of section 1415, it pointed out that courts construing section 1415's fee-shifting provisions have historically relied on cases interpreting the fee-shifting provisions of section 1988. In particular, it found that *West Virginia University Hospitals, Inc. v. Casey*, 499 U.S. 83 (1991), involved interpretation of almost identical language in an earlier version of section 1988. In that case, the Supreme Court rejected the petitioner's argument that expert witness fees should be considered costs under section 1988. The district court, relying on the reasoning in *Casey*, found that the plain language in section 1415 like the plain language in the earlier version of section 1988 failed to provide any statutory authority for allowing recovery of expert witness fees as "costs". The district court next analyzed the parents' argument that expert witness fees are recoverable under section 1988

because IDEA provides for recovery of such fees and costs in a separate action, and section 1988 expressly permits recovery of expert witness fees. While agreeing with both of the parents' propositions, it held that there is "no separate federal action [that can be] brought solely to recover attorneys' fees under section 1988." It found that section 1988's fee-shifting provision only operates for plaintiffs seeking to enforce certain civil rights laws. Consequently, section 1988 has no application where a plaintiff is seeking to recover attorneys' fees and costs under IDEA.

Student was not entitled to a due process hearing under IDEA from a school district when the request for the hearing was made after the student transferred to a charter school because under state law charter schools are considered separate school districts. Student failed to state a cause of action under either the ADA or section 504 because he failed to allege facts showing that the school district acted in bad faith or exercised gross misjudgment. Student also failed to state a cause of action for racial discrimination under title VI because he failed to allege facts showing that race was the motive for his being classified as having a behavior disorder.

Thompson v. Board of the Special School District No. 1, No. 97-1288 (8th Cir. May 19, 1998)

http://caselaw.findlaw.com/cgi-bin/getcase.pl?court=8th&navby=case&no=971288P

The mother of a student with an emotional behavior disturbance placed him in a charter school because of her dissatisfaction with his placement. She then requested a due process hearing under IDEA. A hearing officer ruled that the school district lacked jurisdiction to hear the matter because the student was no longer attending school in the district. A hearing review officer upheld the hearing officer's ruling. The mother filed suit based on deficiencies in his education while attending public school in the district. She alleged: (1) violation of IDEA because she was denied the opportunity to challenge the student's IEP; (2) racial discrimination against the student in violation of title VI because he was denied certain educational services and improperly disciplined; and (3) that the school district discriminated against the student because of his disability in violation of the ADA and section 504. The district court granted the school district's motion to dismiss as to the first count, and granted the school district summary judgment as to the second and third counts.

The appellate court affirmed. Regarding the IDEA claims, it held that the student had failed to state a cause of action because the request for a due process hearing was made after the student had left the school district previously responsible for his education and enrolled in the charter school. The court pointed out that under state law a charter school was considered a separate school district at the time the suit was brought. As a result, the student failed to preserve his challenge to the prior educational services under IDEA. The appellate court also rejected the student's argument that 1997 IDEA amendments obligate school districts to provide the same services to charter school students as they do to their own because it found that the present suit was brought before the amendments went into effect, and that if the student is not presently receiving a free appropriate public education, then he can request a due process hearing. The court quickly disposed of the student's claims based on violation of the ADA and section 504, concluding that the student had failed to establish a *prima facie* case because he had not alleged facts sufficient to show that the school district had acted in bad faith or exercised gross misjudgment. It found that the evidence at best demonstrated a professional disagreement over diagnosis. Moving to the issue of whether the student had established a *prima facie* case of racial discrimination under title VI, the appellate court concluded that the student had failed to allege facts sufficient to show that race was the motive for identifying him as EBD and for disciplinary measures imposed on him. The court found that non-minority students with EBD were treated similarly to the student when they engaged in disruptive behavior.

School district policy allowing student speech, including religious prayer, at high school graduation ceremony does not violate the Establishment Clause because: under the policy the school district does not exert any coercive control over the content of the student speech; the policy has a secular purpose; it neither promotes nor inhibits religion; and it does not foster excessive government entanglement with religion.

Doe v. Madison School District No. 321, No. 97-3562 (9th Cir. May 27, 1998)

http://www.wclp.org/Fed Ct Circuit/9th opinions/973562.htm

School district implemented a policy to invite students, based on academic standing, to make an uncensored presentation at the high school graduation ceremony. The policy provides that the format and content of the speech be controlled solely by the student speaker. In addition, the printed graduation programs contain a disclaimer from the school district expressly disavowing any responsibility for the content of the students' presentations. The plaintiff filed suit alleging that the school district's policy violated the Establishment Clause. She argued that because the policy allowed students to inject prayers and religious songs into the graduation program, it amounted to the school district sanctioning religious graduation ceremonies. The district court disagreed, and *sua sponte* granted summary judgment for the school district.

The appellate court affirmed. It rejected the plaintiff's argument that the *Lee* test prohibits any religious activity at public school graduation ceremonies. It agreed that there is pressure on students to attend graduation and conform with their peers but found there was a lack of significant control exerted by the school over the religious content of the graduation program. It distinguished the present case from *Lee* where the school board affirmatively decided to include prayer to be presented by clergy and prescribed the content of the prayer. The appellate court turned to plaintiff's challenge to the policy based on the *Lemon* test. Applying the first prong of the test to the facts, it found the school district's policy on its face motivated by a number of secular purposes. It flatly rejected the plaintiff's argument that merely authorizing prayer evidences a religious motivation. The court pointed out that to prohibit any religious activity would violate the right to religious freedom also guaranteed by the First Amendment. Regarding the second prong, it concluded that a policy that on its face permits unrestricted student speech does not have the primary effect of advancing religion. In addition, it found that the disclaimer in the printed programs further reduced the chance that the policy would have the effect of advancing religion. As to the third prong, the court found no evidence that the school district's speech policy created excessive government entanglement with religion.

Federal district court was not required to give deference to state administrative hearing officers' finding that student was not disabled within the meaning of IDEA. Parents of student, who unilaterally placed her in private program after school district determined she was not eligible for special education services under IDEA, were entitled to reimbursement because the student was eligible for services under IDEA; the school district's proposed section 504 plan to accommodate the student's disability was not an adequate substitute for a properly devised IEP; and the parent's placement of student in the private program was appropriate under the circumstances.

Muller v. Committee on Special Education of the East Islip Union Free School District, No. 97-7201 (2nd Cir. May 22, 1998)

http://law.touro.edu/2ndCircuit/May98/97-7201.html

Student adopted from an orphanage in Thailand experienced academic difficulties throughout elementary school. In grades one through four, she received special education services for a speech impairment. After being declassified, the student continued to receive remedial reading services through seventh grade. Although she failed multiple subjects in seventh and eighth grade, she was advanced to ninth grade. When the student began exhibiting behavior problems at both home and school and attempted suicide, the parents admitted the student to a private psychiatric treatment facility. Following her release, the student enrolled at a private residential treatment and educational facility for individuals with serious psychological problems. The parents' request for the school district to pay the private facility tuition was referred to the committee on special education (CSE). The school district conducted independent educational and psychological evaluations on the student. When the CSE met, the school district's experts reported that the student's psychological/emotional condition would not adversely affect her ability to learn, and recommended that there was no need for special education services. It recommended the student be evaluated by the section 504 committee. That committee

devised a plan for the student to continue attending the public high school while receiving certain special services. However, the parents enrolled the student in a private day program that provided special education services. The parents appealed the CSE's decision to a state impartial hearing officer (IHO). The IHO found that the student did have a disability under section 504 requiring an accommodation plan and the parents were not entitled to reimbursement costs related to their unilateral private placement of the student. The parents next appealed to a state review officer (SRO) who dismissed the parents' appeal, agreeing with the CSE that the student could not be appropriately classified as emotionally disturbed. The parents filed suit. The district court, conducting a *de novo* review of the student's eligibility under IDEA, found that the she did qualify under IDEA as "emotionally disturbed" and ordered the school district to reimburse the parents for expenses related to placing her in private educational institutions. The school district appealed.

The Second Circuit panel affirmed. It noted that the issue of whether the school district properly classified the student under IDEA as an individual without a disability was strictly an issue of law involving statutory interpretation. While it agreed that the *Rowley* rule requires district courts to give state administrative findings due weight where the issue involves educational methods and practices, it held that, where the issue involves whether a student has a qualifying disability, a court is not bound by the rule and is free to consider the issue of the student's statutory eligibility *de novo*. The panel then turned to the issue of whether the student satisfied the definition of serious emotional disturbance, and thus was eligible for special education services under IDEA. It agreed with the district court's conclusion that the student qualified as suffering from a serious emotional disturbance under state regulations. Having affirmed the district court's holding that the student was eligible for services under IDEA, the panel next reviewed the district court's holding that the parents were entitled to reimbursement for those expenses related to placing the student in private educational institutions. It agreed with the district court that the parents had satisfied both prongs of the *Burlington* test to determine whether a school district is required to reimburse parents. In addition, the proposed section 504 plan was not an adequate substitute for an IEP because when a student is eligible under both statutes, a school district cannot choose which statute it prefers. While noting that IDEA had a statutory preference for mainstreaming and the least restrictive environment, the appellate panel pointed out that the record demonstrated that mainstreaming had not worked for the student. Further, it stated that the school district had failed to provide an IEP to allow the student to continue at the public school. As a result, the parents had no alternative, but to unilaterally place her in a private educational setting, that while restrictive had resulted in marked behavioral and academic improvement by the student.

State version of IDEA did not impose a higher standard for the provision of special education services than the "some benefit" standard under IDEA. Student's IEPs satisfied the requirements of IDEA and were reasonably calculated to provide her with a free, appropriate public education based on her demonstrated progress. Review officer's denial of father's request to present additional evidence was proper because evidence related to teaching methodology, rather than appropriate placement.

O'Toole v. Olathe District Schools Unified School District No. 233, No. 97-3125 (10th Cir. May 21, 1998)

http://caselaw.findlaw.com/cgi-bin/getcase.pl?court=10&navby=case&no=973125

Student was placed in a hearing impaired program in accordance with her IEP. After the 1993 school year ended, the father had the student evaluated at a private institute. In August the father requested an IEP meeting. During the meeting, the IEP team agreed to follow the private institute's recommendations, but recommended that the student remain in the public school program. The father rejected the amended IEP and enrolled the student at the private institute. He then requested a due process hearing regarding the student's private school placement. The hearing officer ruled in the school district's favor. The father appealed the hearing officer's decision to a state review officer. The review officer denied the father's request to present additional evidence on the grounds that it was unnecessary. After reviewing the record, the review officer affirmed the hearing officer, except as to one conclusion. The review officer found that the annual goals and objectives, description of related services, and statement of present levels of functioning in the February 1993 IEP and its August amendment failed to meet the procedural requirements of the state statute and IDEA. The father then sought review in federal district court, and the school district cross appealed the review officer's ruling that the February/August IEPs failed to meet procedural requirements. The district court granted the school district's motion for summary judgment on all issues. On appeal, the father argued: (1) the state educational statute adopted a higher educational standard than the "some benefit" standard under IDEA, and that under the higher standard the student was denied a free appropriate public education; (2) the February/August IEPs were inadequate because they failed to satisfy the procedural requirements of both the state statute and IDEA; (3) the review officer's refusal to permit the father to submit additional evidence related to the impact of the introduction of sign language into student's educational program violated IDEA; and (4) the district court's reliance on its local rule to exclude the additional evidence from consideration in deciding the school district's motion for summary judgment violated IDEA's requirement that district court's conduct an independent review of the record.

Moving to the first issue raised by the father, the appellate court found nothing in the language or legislative history of the state statute to indicate an intent to impose a higher standard than the "some benefit" standard articulated in *Rowley* as applicable in IDEA cases. It next addressed the adequacy of the February/August IEPs. The court first found that, even though the IEPs failed to clearly convey the student's present levels of performance as they related to her disability, and the IEPs on their face failed to explain the import of raw test scores, but did reference them to specialists' reports, the IEPs satisfied the procedural requirements under both the state statute and IDEA. It reasoned that the IEPs in the present case met the primary goals of the procedural requirements by ensuring parental participation in formulation of the IEP, and ensured that the program developed reflected the student's present levels of performance. Turning to the IEPs' annual goals and short-term objectives, it agreed with the district court that they complied with the state statute and IDEA. It pointed out that there is no legal authority requiring a particular level of specificity. With regard to the IEPs' statements that related services would be provided "as appropriate", it found that these technical irregularities did violate the state statute or IDEA because there was no evidence that any related service was requested and denied. It pointed out that the record demonstrated that the student was making various degrees of progress, and that the father was constantly kept aware of her status. In addition, the court found that the August 1993 IEP had incorporated a number of the recommendations from the outside evaluation in response to the father's frustration with the student's progress.

The appellate court opinion turned to the father's final arguments involving the exclusion by both the review officer and the district court of the additional evidence he offered that the student had not been appropriately placed in violation of IDEA. First, the father contended that the review officer erred in refusing to allow him to submit additional evidence related to the impact of the introduction of sign language into a hearing impaired student's educational program. Rejecting the father's attempt to characterize the evidence as going to the issue of appropriate placement, the court found that it more properly went to the issue of teaching methodology. It pointed out that methodology is the kind of issue best resolved by local educators and experts. Finally, the father argued that the district court's reliance on its local rule to exclude the evidence while considering the school district's motion for summary judgment violated IDEA's requirement that the district court conduct an independent review. It rejected the argument finding no inconsistency between the rule and IDEA requirement of *de novo* review, and nothing to indicate that the district court failed to review the case properly under IDEA.

School board policy, requiring all employees to submit to urinalysis following an accident during the course and scope of employment, violated the employees' Fourth Amendment rights by conducting a search without individualized suspicion of wrongdoing because the school board failed to establish a sufficient nexus between a work related injury and drug impairment to satisfy the special needs exception.

United Teachers of New Orleans v. Orleans Parish School Board, No. 98-30885 (5th Cir. May 29, 1998)

http://www.ca5.uscourts.gov/opinions/pub/97-30885-CV0.HTM

Two school boards implemented a written policy requiring all employees to submit to an urinalysis following an accident during the course and scope of employment. The teachers' union filed suit, seeking a preliminary injunction on the ground that the board's testing policy violates its members' rights under the Fourth Amendment to be free from illegal searches and seizures. The district court denied the union's motion for the injunction on the grounds that there was no likelihood that the union would succeed on the merits.

The appellate court reversed and remanded the case with instructions to enjoin the school boards from conducting post-accident urinalysis on employees. It stated that in order to overcome the Fourth Amendment prohibition of unreasonable searches, ordinarily the search must be based on "individualized suspicion of wrongdoing." The court found that the school boards' policies were triggered by an accident regardless of the individual circumstances, rather than individualized suspicion. It pointed out that the only exceptions to the Fourth Amendment prohibition are those based on "special needs, beyond the normal need for law enforcement." It stated that in order to satisfy the requirements of the exception, the school boards must show that the privacy interests implicated by the search (urinalysis) are minimal and there is an important governmental interest furthered by the intrusion that would be placed in jeopardy by the requirement of individualized suspicion. The appellate court concluded that the boards had failed in their burden to establish a sufficient nexus between a work-related injury and drug impairment. In the court's opinion the boards did not provide evidence that there is an identifiable drug use problem among the categories of employees covered by the policy. It concluded that the boards had failed to offer any legal justification for requiring drug testing without a showing of individualized suspicion.

School is not required under IDEA to mainstream autistic student where the marginal benefits of mainstreaming are outweighed by the benefits gained from services provided in a segregated one-on-one setting. Parents' request to place student in a private residential facility is inappropriate because such a placement violates IDEA's least restrictive environment requirement. Parents are not entitled under IDEA to unrestricted observation of the student in his school environment because that right does not fall within the scope of IDEA. District court ordered school board to assemble new IEP team and place student in a new school setting, where court found that the level of animosity between the parents and the teachers at the previous school prevented the parties from working together.

Metropolitan Government of Nashville/Davidson County v. Guest, No. 97-0084 (M.D. Tenn. May 28, 1998)

When the IEP team convened, it recommended that autistic student be placed in a special education classroom 22.5 hours per week and in a regular classroom 10 hours per week during the next school year. The parents objected to the proposed placement, and requested a due process hearing. An administrative law judge ordered that the student remain in a regular classroom full time for the next school year. The school board appealed to the district court. Several months later, when the mother attempted to visit the student's classroom, she was informed by the principal that all future school visits would have to be scheduled in advance with the school office. The principal testified that the policy became formalized the following school year because a parent's presence in the classroom disturbed the teaching environment. Following the incident, the parents filed a motion for a preliminary injunction ordering the school to allow the parents classroom visits without notice or restriction, and to place the student in a private residential school. The parties stipulated that the parents had no disagreement with the IEP, but only with the proposed placement in a non-inclusion setting. The school board requested that the district court reverse the administrative law judge's order, and hold that the proposed placement was appropriate.

Based on the testimony and findings of fact, the district court agreed with the administrative law judge's finding of several procedural violations of IDEA by the school prior to hearing. However, it also found that there had been no procedural violations since the hearing and reversed the administrative law judge's order that the student be placed in a full inclusion program, finding such placement inappropriate. It found that IDEA's preference for mainstreaming does not require it in all cases. The court concluded that in the present case, where the marginal benefits of mainstreaming are outweighed by the benefits gained from services provided in a segregated one-on-one setting, the school is not required under IDEA to mainstream the student. The district court agreed that the school's proposed placement was appropriate. It denied that portion of the parents' motion requesting placement in the private residential school because the court found that such placement would be inappropriate in violation of IDEA's requirement that the student be placed in the least restrictive educational environment. It also denied that part of the parents' motion requesting unrestricted observation of the student at school without prior notice to the school. The court denied the request on the grounds that the appeal was limited to claims under IDEA and that the request did not fall within the scope of IDEA. Finally, the district court ordered that a new IEP team be assembled and that the student be placed in new school setting. Even though the school's previous IEP and placement were appropriate, the level of animosity between the parents and school personnel prevented the parties from working together.

What's New . . . in the Supreme Court

DECISIONS

96-568, ***Oncale v. Sundowner Offshore Services, Inc.***, 118 S. Ct. 998 (1998). http://caselaw.findlaw.com/cgi-bin/getcase/pl?court=US&navby=case&vol=000&invol=96-568

In a unanimous opinion the Supreme Court held that same sex harassment is actionable under Title VII of the Civil Rights Act of 1964. The Court said that Title VII's prohibition on discrimination because of sex extends to sexual harassment of any kind that meets the statutory requirements. The Court emphasized that it has never held that sexual harassment automatically constitutes discrimination because of sex merely because the words used have sexual content or connotations. The critical issue is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed. The Court also said that harassing conduct need not be motivated by sexual desire to support an inference of discrimination on the basis of sex. Discrimination could be found because the harassment includes such sex specific and derogatory terms to indicate that the harasser is motivated by general hostility to the presence of the victim's gender in the workplace. The plaintiff must prove that the conduct at issue was not merely tinged with offensive sexual connotations, but actually constituted discrimination because of sex. The conduct must also be so objectively offensive as to alter the conditions of the victim's employment. The objective severity should be judged from the perspective of a reasonable person in the plaintiff's position, considering all the circumstances. The Court cautioned that in same sex harassment cases, that inquiry requires careful consideration of the social context in which particular behavior occurs and is experienced by its target.

96-827, ***Crawford-El v. Britton***, 118 S. Ct. 1584 (1998) http://supct.law.cornell.edu/supct/html/96-827.ZS.html

In a 5-4 decision, the Supreme Court reversed the Court of Appeals for the District of Columbia by rejecting its ruling that a plaintiff in an unconstitutional motive case against a public official must establish motive by clear and convincing evidence. The Court said that the court of appeals misread the decision in *Harlow v. Fitzgerald*, 457 U.S. 800, as requiring this heightened burden of proof to protect defendants from the costs of litigation. Justice Stevens, writing for the Court, said that *Harlow* made clear that the defendant's subjective intent is irrelevant to the qualified immunity defense but provides no support for making any changes in the nature of the plaintiff's burden of proving a constitutional violation. The Court acknowledged that two of the reasons underlying *Harlow* would support a procedural rule of the type adopted by the court of appeals, i.e., public interest in protecting officials from the cost of damages actions by permitting insubstantial lawsuits to be quickly terminated and in preventing allegations of subjective motivation from being used to shield

baseless suits from summary judgment. However, the Court viewed the factors balanced to define the scope of an affirmative defense to be distinct from those used in evaluating the elements of a plaintiff's cause of action. The Court pointed out that unlike the bare allegations of malice that would have provided the basis for overcoming a qualified immunity defense prior to *Harlow*, more specific allegations of intent are necessary to establish the essential elements of certain constitutional claims. Furthermore, existing law already prevents animus directed solely at the plaintiff from automatically carrying the plaintiff to trial; summary judgment can be granted if there is doubt as to the illegality of the defendant's conduct and for some claims, the plaintiff must show causation as well as improper motive. Finally, the Court found no support in the text of section 1983 or any other federal statute nor in the Federal Rules of Civil Procedure for adopting a clear and convincing burden of proof for cases involving unconstitutional motive. The Court said that it is up to Congress to frame new rules if it finds a compelling need to do so.

96-1291: ***Oubre v. Entergy Operations, Inc.***, 118 S. Ct. 838 (1998) http://caselaw.findlaw.com/cgi-bin/getcase.pl?court=US&navby=case&vol=000&invol=96-1291

After employee received poor performance rating, her supervisor offered her the option of either improving her performance or accepting a voluntary severance agreement. She was given 14 days to consider the offer. When she accepted the offer, she executed a release in which she agreed to waive all claims she might have against the employer in exchange for severance payments over a four month period. However, the release did not specifically refer to claims under the ADEA. After the employee received her last severance payment, she filed an age discrimination complaint with the EEOC which dismissed the complaint, but issued a right to sue letter. The employee filed suit against the employer, alleging constructive discharge on the basis of age in violation of the ADEA and state law. She did not offer or try to return the payments to the employer. The district court granted the employer's motion for summary judgment on the ground that the former employee had ratified the defective release by failing to return or offer to return the severance payments. The Fifth Circuit affirmed. The U.S. Supreme Court granted *certiorari*. It reversed and remanded.

Justice Kennedy spoke for the majority in a six to three decision. It held that in order for a release to constitute a valid waiver of claims under the ADEA, it must satisfy the Older Worker Benefit Protection Act's requirements. It rejected the employer's argument that the state common law contract principles of ratification and equitable estoppel control the outcome of the case. The Court stated that the statutory requirements of the OWBPA preempted the contract principles relied upon by the employer. It pointed out that the statutory language is clear that an employee "may not waive" an ADEA claim unless the waiver satisfies the OWBPA's requirements. It concluded that because the Congress' policy in enacting the law was clearly to protect older workers and the statutory language was unqualified regarding waivers, the Court could not permit ratification where another branch of government forbid it. It also noted that permitting ratification under these circumstances might encourage employers to risk noncompliance knowing that most employees will be unable to return any sums they have received. It left the door open regarding the employer's right to seek restitution, recoupment or set-off.

96-1395: ***LaChance v. Erickson***, 118 S. Ct. 753 (1998) http://caselaw.findlaw.com/cgi-bin/getcase.pl?court=US&navby=case&vol=000&invol=96-1395

Government employees were charged with misconduct by various agencies. In the course of the agency investigations, they made false statements regarding their misconduct. As a result, they were charged with and disciplined for making false statements in addition to the original misconduct. They all appealed the disciplinary actions to the Merit Systems Protection Board (board). The board upheld the disciplinary action based on the original misconduct charge, but overturned the false statement charge on the ground that an employee can not be compelled to report an act of fraud when reporting it would tend to implicate the employee in employment-related fraud. The Office of Personnel Management (OPM) appealed the decision to the Federal Circuit. The appellate court upheld the board's decision. It held that the due process clause bars an agency from charging an employee with falsification based on the employee's denial of another charge or underlying facts related to that other charge.

The Supreme Court granted *certiorari* and reversed the Federal Circuit. Chief Justice Rehnquist, delivering the opinion for a unanimous Court, framed the issue as "whether either the Due Process Clause or the CSRA precludes a federal agency from sanctioning an employee for making false statements to the agency regarding alleged employment related conduct." The Court held that a government agency may take disciplinary action against an employee based on the employee's false statements made in response to an underlying charge of misconduct. Relying on *Bryson v. United States*, 396 U.S. 64 (1969), it stated that while a person could either refuse to answer or answer honestly government inquiries, that person has no right to answer knowingly and willfully with falsehoods.

The Court first disposed of the argument that the procedural rights accorded federal employees under the CSRA provide a basis for the right to deny falsely a charge of employment-related misconduct. Based on its review of those procedural rights, it found "no hint of any right to 'put the government to its proof' by falsely denying the charged conduct." It then turned to the argument that the employees had a due process right to deny the charges falsely. The Court noted that the essence of due process is the right to notice and a meaningful opportunity to be heard. However, it rejected on the basis of precedent and principle the Federal Circuit's view that a meaningful opportunity to be heard includes the right to make false statements in response to a charge of misconduct. It pointed out that it is well established that both criminal defendants and grand jury witnesses are bound to testify truthfully under pain of perjury. It rejected the Federal Circuit's attempt to distinguish the present case from those involving criminal defendants or grand jury witnesses because the employees were not under oath. The Court found that the presence or absence of an oath is immaterial to its due process inquiry. It also rejected the Federal Circuit's reasoning that if employees were not permitted to make false statements, they might be coerced into admitting to misconduct whether they believed they were guilty or not. The Court found this argument frivolous. It stated that employees are adequately protected from such coercion by their Fifth Amendment right to remain silent.

96-1569: ***Bogan v. Scott-Harris***, 118 S. Ct. 966 (1998) http://supct.law.cornell.edu/supct/html/96-1569.ZO.html

In a unanimous decision, the Supreme Court ruled that local legislators are absolutely immune under section 1983 for their legislative activities. Citing long standing common law that supports this conclusion and the need for legislators at all levels of government to be free from the fear of personal liability when exercising their legislative discretion, the Court declared that absolute legislative immunity attaches to all actions taken "in the sphere of legitimate legislative activity." The Court noted that the time and energy required to defend against a lawsuit are of particular concern at the local level, where the part-time citizen-legislator remains commonplace. The Court also pointed out that certain deterrents to legislative abuse may be greater at the local level than at other levels of government since municipalities themselves can be held liable for constitutional violations whereas States and the Federal Government may be shielded by sovereign immunity. Whether an act is legislative turns on the nature of the act, rather than on the motive or intent of the official performing it. Absolute immunity would be of little value if legislators could be subjected to the cost and inconvenience and distractions of a trial upon a conclusion of the pleader or the hazard of a judgment against them based upon a jury's speculation as to motives. The Court said that it did not need to decide whether it is alone sufficient that acts are formally legislative in character to entitle the legislator to immunity, because the act at issue here in substance bore all the hallmarks of traditional legislation; it involved discretionary decision making involving budgetary priorities and services to city residents. Actions that involve termination of a position rather than the hiring or firing of a particular individual also may have prospective implications that reach beyond the particular occupant of the office.

96-1866: ***Gebser v. Lago Vista Independent School District***, 118 S. Ct. 1989 (1998) http://supct.law.cornell.edu/supct/html/96-1866.ZO.html

Female student had sexual relationship with a teacher during the eighth and ninth grades. While the sexual intercourse occurred during class time, it was off-campus. Even though the student realized the teacher's conduct was improper, the student did not report the relationship to school officials. Some months later, a police officer discovered the teacher and student

engaging in sexual intercourse. The teacher was arrested. The school district terminated his employment, and the state education agency revoked his license. During this time period, the district had neither an official grievance procedure for lodging sexual harassment complaints nor a formal anti-harassment policy. The student filed suit against the school district and the teacher, raising claims under title IX along with several state law claims. The district court granted the school district's motion for summary judgment on all claims and remanded the claims against the teacher to the state court. The district court, in rejecting the student's title IX claim, reasoned that the statute was enacted to counteract discriminatory policies in federally funded education programs, and that only if school administrators have some type of notice of sex discrimination and fail to respond in good faith can the discrimination be interpreted as a policy of the school district. The student appealed only the title IX claim. The Fifth Circuit reaffirmed its holding in *Rosa H. v. San Elizario Independent School District*, 106 F.3d 648 (5th Cir. 1997), that a school district is liable under title IX for teacher-to-student sexual harassment only if an employee who has been invested by the school board with supervisory power over the teacher knew of the abuse, had the power to end it, and failed to do so. The U. S. Supreme Court granted *certiorari*, and affirmed the Fifth Circuit by a 5 to 4 vote.

The majority acknowledged that *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60 (1992), established that a school district could be liable in damages under title IX for teacher to student sexual harassment. However, the Court pointed out that the issue of what standard of liability should be imposed on school districts for teacher-to-student sexual harassment in title IX cases was one of first impression, as it never reached the liability question in *Franklin*. It rejected the student's attempt to apply agency principles to title IX cases based on the comparison of teacher-to-student harassment with supervisor-to-employee harassment made in *Franklin*. The majority found the student's attempt to apply title VII agency principles to title IX faulty because unlike title VII's statutory definition of "employer" which includes "any agent", there is no comparable reference in title IX to an educational institution's "agents." Therefore, it concluded that title IX does not expressly call for the application of agency principles. It also pointed out that unlike title VII where the right to recover monetary damages is statutorily mandated, the right to recovery of monetary damages under title IX is judicially implied. Based on the fact that the right is judicially implied, the Court stated it had latitude in crafting a standard that would not "frustrate the purposes" of title IX. It concluded that permitting recovery for teacher-to-student sexual harassment in title IX cases based on either *respondeat superior* or constructive notice would "frustrate the purposes" of title IX because Congress's main objectives were to prevent the use of federal resources to support discriminatory practices and to protect individual citizens from such practices. To the majority, imposition of the broader standards of *respondeat superior* or constructive notice while making recovery of damages easier for a harassment victim, would be at odds with title IX's objective of preventing and protecting individuals from institutional discrimination because those holding institutional authority would be charged with preventing and protecting, even though they were unaware of the teacher's discriminatory conduct. It concluded that the only standard that would be consistent with the purposes of title IX would be actual notice. The Court, therefore, held that in the absence of congressional action on the subject, a school district is liable under title IX for teacher-to-student sexual harassment only if there is actual notice to a school employee with supervisory authority who has power to end the harassment and fails to do so.

97-29: ***Texas v. United States***, 118 S. Ct. 1257 (1998)
http://supct.law.cornell.edu/supct/html/97-29Z0.html

In an unanimous opinion the Supreme Court affirmed the district court's determination that the State's request for a declaratory judgment that the preclearance provisions of section 5 of the Voting Rights Act do not apply to implementation of the section of the Texas Education Code that permits the State to sanction local school districts for failure to meet state-mandated educational achievement levels is not ripe for adjudication. The provisions at issue allows the State to appoint a master or management team who would have power to approve or disapprove any action taken by a school principal, district superintendent or district board of trustees and who could also direct them to act. Because the appointment of a master or management team is contingent upon a number of factors which may or may not occur, the Court said the issue is not fit for adjudication. The Court refused to take the view espoused by the State that under no circumstances would the imposition of a master or management team constitute a change affecting voting requiring preclearance. The Court said the operation of the statute is better grasped when viewed in light of a particular application and after permitting the state courts further opportunity to construe the provisions. The Court also found that the hardship on the State of not granting the declaratory judgment would be insubstantial. If the State is confident that imposition of a master or management team does not constitute a change affecting voting, it can simply go ahead with the appointment. If a suit is brought, the district court would deny the request for a preliminary injunction if the matter is as clear as the State contends it is.

97-282: ***Faragher v. City of Boca Raton***, 118 S. Ct. 2275 (1998)
http://supct.law.cornell.edu/supct/html/97-282.ZO.html

Between 1985 and 1990 petitioner worked for the city's recreation department as a part-time and summer ocean lifeguard. She had three immediate supervisors: the chief of the marine safety division, her captain, and the training captain. Although the city had adopted a sexual harassment policy in 1986, it failed to disseminate the policy to the marine safety division. As a result, the chief, the captains, and many of the lifeguards were unaware of the policy. Petitioner and other female lifeguards were subjected to inappropriate touching of a sexual nature and vulgar comments regarding women and sex by the chief and the captain but did not complain to higher management about the chief's and captain's behavior. She did discuss their behavior with the training captain, as did other female lifeguards. The training captain did not report the conversations to the chief or any other city official because he did not believe it was his place to do so. Approximately two months before the petitioner resigned, a former lifeguard wrote the city's personnel manager, complaining that the chief and the captain had sexually harassed her and other female lifeguards. The city investigated and found that the chief and the captain had sexually harassed female lifeguards. They were reprimanded and subjected to other discipline.

Following her resignation, the petitioner filed suit against the city in district court, alleging that her supervisors' conduct constituted a hostile work environment in violation of title VII. The district court concluded that the supervisors' misconduct was sufficiently serious to alter the conditions of the petitioner's employment, constituting a hostile work environment. On appeal, the Eleventh Circuit reversed the district court. Although the panel agreed that the supervisors' conduct was severe and pervasive enough to create a hostile work environment, it concluded: that the chief and the captain were not acting within the scope of employment when they engaged in the harassing conduct; that they were not aided in their conduct by the agency relationship; and the city did not have constructive knowledge of the harassment as a result of the training captain's actual knowledge. The Eleventh Circuit, sitting en banc, adopted the panel's conclusions. First, it found that the supervisors' harassment of petitioner constituted a "frolic" which was conduct clearly outside the scope of their employment. The court next concluded that the supervisors' agency relationship did not facilitate their harassment because neither of them threatened to fire or demote the petitioner. It also agreed with the panel that the city lacked constructive knowledge because the facts did not support a finding that the harassment was so pervasive that the city should have known about it. The U. S. Supreme Court granted *certiorari* in order to address the issue of what standard of liability should be imposed on employers under title VII when sexual harassment by supervisory employees of subordinates creates a hostile work environment.

Justice Souter after reviewing the Court's previous decisions in title VII cases involving claims of hostile work environment found that these decisions had clearly defined what kinds of conduct would constitute hostile work environment but had established few rules to determine when an employer would be held liable for hostile work environment. He observed that the Court had no difficulty in finding the employer liable where the harassing employee belonged to a class of corporate officials that could be classified as the employer's proxy, *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993), or where supervisory personnel have taken discriminatory employment actions with tangible results, such as hiring, firing, promotion, compensation and work assignment, as in *Meritor*. The opinion in *Meritor* concluded that it was

Congress' intent that courts utilize traditional principles of agency law in determining standards of liability for employers for the misconduct of supervisory employees. *Meritor* had rejected limiting employer liability on the basis of the existence of a company grievance procedure or the absence of actual notice of the harassment by upper management, while at the same time refusing to impose strict liability on employers for a supervisor's sexual harassment.

Having firmly established *Meritor*'s holding as controlling in the present case, Justice Souter turned to the petitioner's possible grounds drawn from agency law for holding the city vicariously liable. Regarding the scope of employment argument, Justice Souter concluded there were two reasons for not expanding the definition of scope of employment as suggested by the petitioner. First, there is no evidence that Congress intended for courts to ignore the traditional distinction drawn between acts falling within the scope of employment and acts amounting to frolics or detours from the course of employment. Second, the unanimity of views among the courts of appeals and the district courts that the type of harassment at issue in the present case is not only outside the scope of supervisors' authority, but also is outside the scope of co-workers' common duties. He noted that if the definition of scope of employment was broadened to encompass supervisory conduct that creates a hostile work environment based on the rationale that such conduct is a risk of doing business, then there would equal justification for including co-workers' harassment based on the same rationale.

Turning to the petitioner's aided by agency relationship argument, Justice Souter agreed with petitioner that an employer should be held vicariously liable for a supervisor's sexual harassment of a subordinate based on the aided by agency principle embodied in the Restatement (Second) of Agency section 219 (2)(d) (1957). He emphasized that a supervisor's superior position, along with the ability to affect a subordinate's terms and conditions of employment, make it less likely that a victim of supervisory harassment will be willing to report the harassment. Justice Souter concluded that the supervisor is aided in carrying out his misconduct as a result of this agency relationship between supervisor and employer. He further noted that because of the agency relationship an employer has greater opportunity and incentive to guard against such supervisory misconduct. However, he cautioned that before the Court could recognize this theory under title VII, it had to ensure that it is consistent with the holding in *Meritor* that employers are not automatically liable for supervisory harassment. To ensure consistency, the Court recognized an affirmative defense to liability, even though a supervisor has engaged in actionable conduct. This defense would allow an employer to prove that it had exercised reasonable care to avoid harassment and to eliminate it when it might occur and that the complaining employee failed to act reasonably to avail herself of the employer's safeguards or otherwise prevent harm that could have been avoided. He cautioned that the affirmative defense is not available when the supervisor's harassment culminates in tangible employment action, such as discharge, demotion or undesirable work reassignment. Applying the holding to the facts of petitioner's case, he found that the chief and the captain had engaged in sexually harassing behavior that constituted an actionable hostile work environment claim. He concluded that the record was devoid of evidence that would provide the city with an avenue to raise the affirmative defense because it failed to disseminate its sexual harassment policy among beach employees and it made no attempt to keep track of the conduct of supervisors like the chief and the captain. He also noted that the city's policy contained no provision that employees could bypass their supervisors when filing a complaint. Therefore, he held as a matter of law that the city could not be found to have exercised reasonable care to prevent the supervisors' harassing conduct. As a result, the majority reversed without remanding for consideration of petitioner's efforts to mitigate damages because the damage award was nominal.

97-569: ***Burlington Industries, Inc. v. Ellerth***, 118 S. Ct. 2257 (1998) http://supct.law.cornell.edu/supct/html/97-569.ZO.html

In this case, the Supreme Court was again confronted with a supervisor's sexual harassment of a subordinate that created a hostile work environment. The petitioner a female salesperson, was subjected by a division vice president to touching of a sexual nature, sexual comments, and threats that she would suffer adverse job action if she failed to comply with his requests for sexual relations. However, none of the threats were ever carried out. The petitioner never reported any of the incidents, even though she was aware her employer had a policy against sexual harassment. It was only after she resigned that the petitioner informed her employer by letter of the vice president's conduct. She subsequently filed suit in district court. Petitioner framed her title VII allegations as a hostile work environment claim. The district court proceeding on the premise that an employer is vicariously li only for *quid pro quo* sexual harassment, applied the negligence standard to her claim and dismissed it. The Seventh Circuit, sitting en banc, reversed without providing a consensus for a controlling rationale. However, there was apparent agreement that the employer could be held vicariously liable based on the vice president's threats to take tangible work action.

Justice Kennedy, delivering the majority's opinion, started from the premise that whether the petitioner's claim was categorized as hostile work environment or *quid pro quo* would not control whether the employer could be held vicariously liable under title VII for a supervisor's threats of adverse job action that were not acted upon. Based on *Meritor*, he found the Restatement (Second) of Agency (1957) a useful starting point for determining what standard of liability should be imposed on employers. He rejected the scope of employment theory, stating that as a general rule sexual harassment by a supervisor is not conduct within the scope of employment. He then reviewed section 219(2) of the Restatement to determine what if any agency principles might be applicable to a situation where a supervisor sexually harasses a subordinate. Justice Kennedy concluded that only subsections (b) and (d) were possible grounds for imposing vicarious liability on an employer for the acts of a supervisor. Noting that subsection 219(2)(b) imposes liability under a negligence standard of knew or should have known, he pointed out that petitioner was pressing for a more stringent standard based on vicarious liability as in subsection 219(2)(d). He rejected that part of subsection 219(2)(d) that bases liability on the employee's apparent authority because the employee is exercising authority he does not actually have, as opposed to the situation in the present case involving misuse of actual authority by the supervisor. On the other hand the other part of 219(2)(d), which he characterized as the aided in the agency relation rule, imposes vicarious liability based on agent's misuse of delegated authority. Kennedy found the aided in the agency relation rule a more appropriate standard under title VII for imposing vicarious liability on an employer for t misconduct of a supervisor. However, he cautioned that this required more than the mere existence of an agency relationship because without more an employer could also be held vicariously liable for a co-worker's harassment. In order to avoid this result, Justice Kennedy stated that the employee engaged in the harassing conduct must belong to a class of employees having the power to make tangible employment decisions, in short he must have supervisory authority.

Finally, Justice Kennedy discussed how the imposition of vicarious liability under title VII on employers could be squared with the statute's policy of encouraging employers to take voluntary steps to comply with its mandate. As did the majority in *Faragher*, he concluded that providing employers with the opportunity to raise an affirmative defense in cases where the employer has taken proactive measures to prevent and eliminate such harassment, and the victim knew of the measures and failed to utilize them. However, he cautioned that this defense was available only in those cases where the supervisor had not taken adverse job action against the victim.

97-689: ***Geissal v. Moore Medical Corp.***, 118 S. Ct. 1869 (1998) http://supct.law.cornell.edu/supct/html/97-689.ZS.html

In an unanimous opinion, the Supreme Court ruled that an employer may not deny COBRA continuation coverage under its health plan to an otherwise eligible beneficiary because he is covered under another group health plan at the time he elects COBRA coverage. The Court so ruled based on a plain reading of the statute that allows the employer to discontinue coverage when the beneficiary "first becomes, after the date of election—covered under any other group health plan." The Court rejected the employer's argument that this language should be interpreted to mean that the first moment of coverage under the pre-existing plan on the day following the election is the moment of first being covered after the date of the election, saying that such a reading robs the modifier "first" of any consequence and equates "first becomes . . .covered" with "remains covered." The Court said that even though it is true that its reading of COBRA does not preserve the circumstances as of the date of the qualifying event, the statute is not cast expressly in terms of the status quo except in reference to the coverage subject to election. Thus, it is possible for a beneficiary to obtain entirely new group

coverage between the qualifying event and the election of COBRA coverage and still be entitled to claim continuation coverage. The Court also refused to adopt the approach taken by several lower courts that COBRA coverage may be denied to individuals with other group insurance on the election date unless there is a "significant gap" between the coverage offered by the employer's plan and that offered by the beneficiary's other group health plan. This approach, said the Court, has no support in the statute and injects courts into a social policy arena unsuitable for judicial decision making.

97-954: ***Hetzel v. Prince William County***, 118 S. Ct. 1210 (1998) http://supct.law.cornell.edu/supct/html/97-954ZPC.html

In a per curiam opinion the Supreme Court held that under the Seventh Amendment an appellate court cannot enter a writ of mandamus ordering a lower court to enter judgment for a lesser amount than that determined by a jury in a Title VII case without allowing the plaintiff the option of a new trial.

SUMMARY DISPOSITION

96-679: ***Piscataway Township Board of Education v. Taxman***, 91 F.3d 1547 (3d Cir. 1996) (en banc). Supreme Court dismissed on joint motion of the parties a case it had accepted for review from the Third Circuit holding that public school district had discriminated in violation of Title VII of the Civil Rights Act of 1964 by laying off a white teacher who had equal qualifications and seniority to the black teacher it retained under an affirmative action policy that allowed the board to consider race in order to promote racial diversity as an educational tool rather than to remedy any past discrimination by the district or to rectify a racial imbalance in its work force. The Third Circuit approved the district court's award of full backpay to the plaintiff, saying that this remedy most closely approximates conditions that would have existed had there been no discrimination. The parties requested the dismissal after reaching a settlement agreement. *Cert. granted*, June 27, 19 . *Rule 46 dismissal*, Dec. 2, 1997.

REVIEW GRANTED

96-1793: ***Cedar Rapids Community School District v. Garret F.***, 106 F.3d 822 (8th Cir. 1997). Supreme Court has accepted for review Eighth Circuit case which raises the issue of whether the Individuals with Disabilities Education Act requires a school district to pay for one on one nursing services for a quadriplegic elementary school student as a related service or whether it is a medical service for which the school district is not obligated to pay. *Cert. granted*, May 18, 1998.

97-889: ***Wright v. Universal Maritime Service Corp.***, unpublished opinion (4th Cir. July 29, 1997). Supreme Court will hear case raising the question of whether an arbitration clause in a collective bargaining agreement that covers "all matters affecting wages, hours, and other terms and conditions of employment" precludes an employee covered by the agreement from bringing a lawsuit under federal anti-discrimination law. *Cert. granted*, Mar. 2, 1998.

REVIEW DENIED

97-1421: ***Worley v. Pennsylvania Public School Employees' Retirement Board***, 689 A.2d 334 (Pa. Commw. 1997). Supreme Court let stand Pennsylvania state court ruling that conscientious objector's civilian work done in place of service in the armed forces does not constitute "military service" for which credit can be purchased in the state school employees' retirement system. To interpret the code provision in this manner does not violate due process requirements or the equal protection clause. *Cert. denied*, April 27, 1998.

97-1454: ***Anchorage Education Association v. Patterson***, 131 F.3d 807 (9th Cir. 1997). Supreme Court declined to review Ninth Circuit holding that non-members of a public school employees union are not required to pursue the arbitration remedy established in the collective bargaining agreement before seeking court relief for objection to agency fees based on First Amendment grounds. *Cert. denied*, June 1, 1998.

97-1462: ***Yeo v. Lexington, Mass.***, 131 F.3d 241 (1st Cir. 1997) (en banc). High Court declined to review First Circuit ruling that there was no state action that would support an action under section 1983 when high school student editors refused to publish in school newspaper and yearbook an advertisement promoting sexual abstinence. The First Circuit based its decision on the fact that the students exercised independent editorial judgment free from interference from school officials as mandated by state law. *Cert. denied*, June 1, 1998.

97-1477: ***Long v. Alachua County School Board*** (Fla. D. Ct. App. Dec. 17, 1997). Supreme Court will not hear challenge to Florida state court ruling that affirmed summary judgment for the school board in a case which claimed that the board violated students' and parents' due process rights under the Fourteenth Amendment by requiring the students to be exposed to television programming that includes commercial advertising while attending school. *Cert. denied*, June 8, 1998.

97-1541: ***Smith v. Metropolitan School District Perry Township***, 128 F.3d 1014 (7th Cir. 1997). Supreme Court rejected request for review of Seventh Circuit decision that held that Title IX of the Education Amendments of 1972 does not impose liability on a school district for a teacher's sexual harassment of a student unless a supervisory employee with power over the offending employee actually knew about the harassment and had power to end the misconduct but failed to do so. *Cert. denied*, June 26, 1998.

97-1555: ***Arkansas Christian Educators Association v. Ozarks Unlimited Resources Cooperative***, unpub. op. (8th Cir. Dec. 16, 1997). High Court rebuffed challenge to Eighth Circuit opinion that educational cooperative consisting of 21 school districts is arm of the state and therefore is immune from damages claim brought by plaintiffs for alleged First Amendment violations stemming from the cooperative's expulsion of Christian educators from exhibition at in-service education workshop. The Eighth Circuit also held that the workshop was a nonpublic forum so that removal of the plaintiffs based on their distribution of literature that addressed issues outside the purpose of the workshop was reasonable and viewpoint neutral. *Cert. denied*, May 18, 1998.

97-1568: ***Clynes v. Fort Zumwalt School District***, 119 F.3d 607 (8th Cir. 1997). Supreme Court left intact Eighth Circuit ruling that reviewed district court's decision de novo and held that parents were not entitled under the Individuals with Disabilities Education Act to tuition reimbursement for the cost of the private school where they placed their learning disabled child without the school district's permission. The Eighth Circuit found that the IEPs offered by the school district complied with the IDEA. *Cert. denied*, May 26, 1998.

97-1747: ***North Lawrence Community School Corp. v. Mary M.***, 131 F.3d 1220 (7th Cir. 1998). Supreme Court did not disturb ruling by Seventh Circuit that junior high school student does not need to show that sexual advances made by an adult employee were unwelcome to prove a hostile environment claim under Title IX. *Cert. denied*, June 26, 1998.

97-1750: ***Bryant v. Caddo Parrish, La. School Board***, unpub. op. (5th Cir. Sept. 26, 1997). Supreme Court decided not to hear oral arguments in case from Fifth Circuit that had approved the use of racial criteria by school district with history of racial discrimination to select students for magnet school admissions to ensure that the racial composition of the student bodies at those schools fell within certain ranges. *Cert. denied*, June 22, 1998.

97-1764: ***Bauchman v. West High School***, 132 F.3d 542 (10th Cir. 1998). Supreme Court denied request for *certiorari* in Tenth Circuit case raising the issue of whether teacher's selection and use of Christian music for performances by public school choir at Christian churches violated the establishment clause or the rights of a Jewish student choir member under the free exercise clause or free speech clause. *Cert. denied*, June 26, 1998.

97-1776: ***Pruitt v. Waco Independent School District***, unpub. op. (5th Cir. Jan. 29, 1998). Supreme Court declined review of Fifth Circuit opinion finding no property interest was created by school district's policies and procedures limiting the use of corporal punishment so that no due process violation occurred when student was paddled without prior notice to the parent. *Cert. denied*, June 22, 1998.

97-1780: ***In re James***, unpub. op. (M.D. Ala. July 30, 1997). Supreme Court denied petition for mandamus filed in a case in which a federal district court in Alabama had denied the governor's motion to

dismiss a suit in which the court had enjoined enforcement of the state school prayer statute and various religious activities promoted or sanctioned in the public schools. Citing *stare decisis*, the court denied the motion that had contended that the Fourteenth Amendment does not apply the First Amendment to the states. *Review denied*, June 22, 1998.

Chairman's Notes

1999 SCHOOL LAW SEMINAR

The Council's 1999 School Law Seminar will be held in conjunction with the NSBA Conference and Exposition in **San Francisco on April 8-10, 1999**. The tentative location for the seminar is the Hilton Hotel. Already on the seminar program is the latest information on such key issues as preventing violence in schools, the school attorney's role in handling school violence, dealing with the media during a crisis, criminal record checks and mandatory fingerprinting, and legal ethics. **JULIE UNDERWOOD**, NSBA's General Counsel will provide a Supreme Court update with a final hour reserved for a "Hot Topics" session. During the Saturday morning concurrent sessions, **CYNTHIA LUTZ KELLY**, Deputy General Counsel for the Kansas Association of School Boards will preside at the special education session focusing on the new regulations to be issued under the IDEA and **ANTHONY G. SCARIANO** of Scariano, Kula, Elich & Himes, Chicago, IL will lead the labor relation programs which will cover such topics as how to handle a strike. Also back by popular demand, the Council will again offer on Thursday afternoon, "Back to Basics: A School Law Primer," chaired by **GARY R. THUNE** of Pearce & Durick, Bismarck, ND.

School Law Seminar attendees are encouraged to register for the NSBA Conference in order to take advantage of the other legal programming available at conference clinics sponsored by the Council of School Attorneys. Clinic sessions currently planned include Internet use at school, religious expression, sexual harassment and performance based contracts.

For more information on the School Law Seminar, look for the brochure and registration materials which will be mailed to all Council members early this fall or contact Lyndsay Andrews, Legal Services Manager at 703-838-6738.

SAN ANTONIO SEMINAR

Don't miss this opportunity to revitalize yourself and your practice and earn CLE credits—register now for the Council's advocacy seminar to be held in San Antonio, **October 15-17, 1998 at the Marriott Riverwalk Hotel!** Some of the topics include affirmative action, special education for private school students, school design and construction, ethics, sexual harassment, copyright and fair use, and the Fair Labor Standards Act. Program and registration information has been mailed and is also available on the Council's web site at **http://www.nsba.org/cosa/seminars/98advocacy.htm**.

E-MAIL ADDRESSES AND FAX NUMBERS

The Council is still collecting member e-mail addresses and fax numbers in order to create contact data bases that will help speed the distribution of current school law information. If you have not already done so, please provide your e-mail address and fax number to Sheila Raehre, at sraehre@nsba.org or by fax at 703-548-5613.

Sincerely,

Ann L. Majestic
Chairman

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